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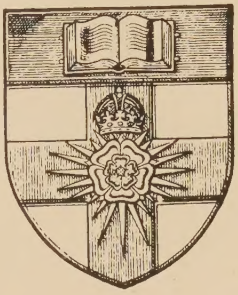

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1891.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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1891.—VOL. III.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

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In the First Series,
[1891] 1 Ch. [1891] 2 Ch. [1891] 3 Ch.

In the Second Series,
[1891] 1 Q. B. [1891] 2 Q. B. [1891] P.

In the Third Series,
[1891] A. C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

METCALFE *v.* METCALFE.

C. A.
1891
May 28.

[1889 M. 929.]

Will—Forfeiture Clause—Bankruptcy—Annulment—Time of Annulment.

A testator by his will gave to his trustees real and personal estate in trust to pay the rents and profits to his children as tenants in common during their respective lives with benefit of survivorship. He then declared that if by any act or by operation of law any interests given by his will in trust for his children should be aliened, whereby the same should vest in any other person, then the trustees should apply the interest so aliened to and among the other persons entitled to the same by survivorship, as in the case of the death of the persons so aliening.

One of the testator's children became a bankrupt between the date of the will and the testator's death. Within a year after the testator's death she became entitled to property which when sold was sufficient to pay the debts and costs; but the bankruptcy was not annulled until more than two years after that. The trustees of the will had paid the rents and profits to the other children, considering that they were forfeited:—

Held (affirming the decision of *Kekewich*, J.), that the life interest of the legatee in the rents and profits was forfeited by her bankruptcy.

White v. *Chitty* (1), and *Lloyd* v. *Lloyd* (2) distinguished.

THIS was an appeal from a judgment of Mr. Justice *Kekewich* (3).

Thomas Metcalfe by his will dated the 10th of May, 1864, bequeathed certain personal estate to his children as tenants in

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.
(3) 43 Ch. D. 633.

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common. He then devised and bequeathed to trustees all his real and leasehold estates, and all his residuary personal estate upon trust to pay one-third of the rents and profits to his wife during her life or widowhood, and to pay the remaining two-thirds equally between all his children who should be living at his decease during their respective lives, and the lives or life of the survivors or survivor of them. He then gave certain reversionary interests to the trustees upon similar trusts. The trusts of the will are stated at greater length in the previous report. The will contained the following clause: "Provided always that if by any act or default, or by operation of law, the part or share, parts or shares, or the whole of the said rents and profits or any other sum of money or interests limited or bequeathed by this my will in trust for my said wife and children or child, grandchildren or grandchild, or either of them shall be aliened, charged, or disposed of, either in part or as to the whole of the said several and respective shares and interests, whereby the same respectively would but for this provision vest in or become payable to some other person or persons other than my said wife, children or child, grandchildren or grandchild, or some of them, then my said trustees or trustee shall upon such act or default, or upon such operation of law as aforesaid, pay or apply the share or shares, interest or interests so aliened, charged, or disposed of, or attempted to be so dealt with as and in manner aforesaid to and among the others or other of the persons who would have been entitled to the same by survivorship in remainder or otherwise under the aforesaid trusts, as in the case of the death or deaths of the person or persons so aliening, charging, or disposing of his, her, or their respective shares and interests, or attempting the same in manner aforesaid."

By a codicil the testator appointed his wife, one of his daughters, and *J. E. Lawford*, executors and trustees of his will.

The testator died on the 7th of February, 1884, leaving five children him surviving, one of whom, *George Arthur Metcalfe*, died on the 17th of January, 1885.

The Plaintiff, *Georgina Metcalfe*, another of the children, had been adjudicated bankrupt on the 16th of March, 1882.

The proceedings in bankruptcy were admitted in evidence,

and from them it appeared that *Georgina Metcalfe* was at the time of the testator's death entitled under another will to a reversion, which was sold by the trustee in bankruptcy, but did not produce enough to pay her creditors and costs.

On the death of *George Arthur Metcalfe*, *Georgina Metcalfe* became entitled to another reversion under the same will. The trustee in bankruptcy had, however, died in 1885, and this occasioned delay, and this second reversion was not sold till January, 1887. That sale produced sufficient to satisfy the creditors and pay the costs, and the bankruptcy was annulled on the 10th of June, 1887.

The executors and trustees did not pay to the Plaintiff any part of the testator's estate, or any of the rents and profits, considering that they were forfeited by the bankruptcy. No part of the reversionary interests belonging to the testator had come into possession since the annulment of the bankruptcy.

Georgina Metcalfe brought this action against the executors and the other children, claiming administration of the estate of *Thomas Metcalfe*. At the trial of the action Mr. Justice *Kekewich* held—(1.) That as to the absolute gift of a share in the personal estate, the claim of forfeiture was repugnant and of no effect. (2.) That with respect to estates in remainder not come into possession before the annulment, personal enjoyment by the legatee was not interfered with, and the forfeiture did not take effect. (3.) That the Plaintiff had incurred a forfeiture of her life interest in the share immediately divisible bequeathed to her by the testator's will of the rents and profits of the real and leasehold estates of which the testator died possessed; and also of her life interest in the accrued share to which she would have been entitled on the death of her brother, *G. A. Metcalfe*, if there had been no forfeiture clause.

The Plaintiff appealed from this judgment, so far as related to the forfeiture of her life interest in the rents and profits of her original and accrued shares.

Warmington, Q.C., and *T. B. Napier*, for the Appellant:—

The forfeiture clause can only apply to a future bankruptcy, and not to one before the death of the testator; especially where,

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as in this case, the bankruptcy occurred two years before the testator's death, and he therefore must have known of it. The word "vest" in the forfeiture clause ought not to be taken too strictly. The trustee in bankruptcy might have taken possession of the income if there had been no forfeiture clause; but if he had, it would have been held eventually for the Appellant. He did not in fact do so, and now all the property has revested in the Appellant. All the authorities make a distinction between cases in which the property has been actually realized in the bankruptcy, and where it has not. The bankruptcy ought to have been annulled in January, 1885, when the estate became solvent, which was within a year of the testator's death. The trustees did wrong in refusing to pay the income to the Appellant; they knew, or ought to have known, that she was not really insolvent: *White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2); *Trappes* v. *Meredith* (3); *Ancona* v. *Waddell* (4); *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 81.

Neville, Q.C., and *Gaselee*, for the Respondents, were not called on.

1891. May 28. LINDLEY, L.J.:—

This case turns upon the construction of a common form of forfeiture clause in a will in the case of bankruptcy of the legatee. [His Lordship read the clause as set forth above.] The first question on the appeal is whether the language of this forfeiture clause has any application to a bankruptcy which took place before the death of the testator. If we only look at the words of the clause, there would seem to be a difficulty in construing it so as to include a bankruptcy commencing before the testator's death—that is, before the will came into operation. But that particular point is covered by so many authorities, that it is impossible for us to do otherwise than follow them. It has been held that in order to give effect in such cases to the obvious intention of the testator, which is to secure the personal enjoyment by the legatee of the property left by the will, a

(1) Law Rep. 1 Eq. 372.
(2) Ibid. 2 Eq. 722.
(3) Law Rep. 7 Ch. 248.
(4) 10 Ch. D. 157.

clause of this kind applies to a bankruptcy existing at the testator's death. And so far has this doctrine been carried, that in *Trappes* v. *Meredith* (1), which was followed by *Ancona* v. *Waddell* (2), it was held by the Court of Appeal that a forfeiture clause applied to a bankruptcy which took effect before the date of the will, although it was known to the testator. In *Trappes* v. *Meredith* the decision of Vice-Chancellor *James* was overruled by the Court of Appeal; but I should have thought the reasoning of the Vice-Chancellor in that case was sounder than that of the Court of Appeal. However, that decision is binding upon us, and we are not at liberty to hold that this clause does not apply to a bankruptcy which took effect before the will came into operation.

That being so, the next question is whether there was such a state of circumstances that the gift over took effect? Was there ever a time after the death of the testator at which the other legatees were entitled to demand from the trustees of the will payment of the bankrupt's share? It is impossible to say that there never was such a time. The testator died in 1884, and for a long time after that the state of the bankrupt's affairs was such, that the trustee in bankruptcy would certainly have sold her share to satisfy her creditors if he could have got it; therefore the trustees of the will have rightly paid over to the other legatees the rents and profits both of the original and of the accrued share. It was contended that because the Plaintiff had assets falling in which proved sufficient to pay off her creditors, and to enable her to obtain an annulment of the bankruptcy, that gave her the right to deprive the other legatees of the rents and profits which they had received. None of the authorities go to anything like that length, although they have strained the language of these forfeiture clauses. In all those cases nothing had in fact been done before the bankruptcy was annulled. In one case, *White* v. *Chitty* (3), Sir *W. P. Wood*, V.C., said: "I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position

(1) Law Rep. 7 Ch. 248. (2) 10 Ch. D. 157.
(3) Law Rep. 1 Eq. 372.

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to receive them." So, also, in *Lloyd* v. *Lloyd* (1), the bankruptcy was annulled before anything was done, no steps having been taken to realize the assets; and the same principle was followed in *Ancona* v. *Waddell* (2). On the other hand, in *Robertson* v. *Richardson* (3), it was laid down that if any income became due under the testator's will which the trustee in bankruptcy of the legatee might, but for the forfeiture clause, have received, the forfeiture took effect. Therefore, although we must hold, in accordance with the authorities, that the forfeiture clause applies to a bankruptcy existing at the testator's death, we cannot possibly, on the other hand, stretch the words of this clause so as to deprive the persons entitled under the gift over of their right to the rents and profits. The appeal must therefore be dismissed.

BOWEN, L.J.:—

That forfeiture clauses are to take effect in the case of a bankruptcy existing at the testator's death has been settled by a chain of authorities by which we are bound, and is a doctrine based on the notion that the Court is giving effect to the intention of the testator by giving this non-natural meaning to the words which he has used. But to stretch the doctrine so far as it was stretched in *Trappes* v. *Meredith* (4), where the testator knew of the bankruptcy at the date of the will, appears to me to leave common sense aside. But upon this construction of forfeiture clauses, which I have called the non-natural construction, a counter-check has been imposed by the decisions which say that a forfeiture clause will not apply to a bankruptcy existing at the testator's death where nothing effectual has taken place under the bankruptcy and it is subsequently annulled, but that has never been carried further than the case in which no right to have anything paid over has accrued to the trustee in bankruptcy. It has been pointed out in *Robertson* v. *Richardson* that in determining whether a forfeiture clause takes effect, the crucial time in the case of a gift of income is the time when the right to have the first payment of income accrues. If at

(1) Law Rep. 2 Eq. 722.
(2) 10 Ch. D. 157.
(3) 30 Ch. D. 623.
(4) Law Rep. 7 Ch. 248.

that time the bankruptcy is not annulled, the right is then finally vested in the persons entitled to the gift over, and it is impossible to take it away from them. Otherwise, ten years afterwards a beneficiary might be called upon to divest himself of the interest which he had rightly got. Therefore, in view of the fact that the cases of *White* v. *Chitty* (1), *Lloyd* v. *Lloyd* (2), and *Ancona* v. *Waddell* (3) have stopped short of saying that the doctrine there laid down is applicable to a case like this, I think we ought not to accede to the Appellant's argument.

FRY, L.J.:—

If this matter were free from decision, the inclination of my mind would be in favour of the Appellant, because the act which is to create the forfeiture under this clause is a future act; but the decisions are too strong to enable me to take that view on that point. It has been determined that any bankruptcy which takes effect before the testator's death, the operation of which continues after the testator's death, is for the purposes of these forfeiture clauses to be regarded as a future event. That being so, we must consider what is the disposition of the testator. Here he has disposed of certain rents, which he has directed to be paid over either to *A.* or *B.*, according to the happening of certain contingencies. The time, therefore, at which we must regard the rights of the parties is the time at which it first becomes the duty of the trustees of the will to make a payment. As the rents must have been payable quarterly or half yearly, that time must have been some time in 1884. The utmost that the Appellant could be heard to say would be, that at the time when the trustees of the will were under an obligation to make that payment, the Appellant had a right to annul the bankruptcy. Whether that would be enough I do not say, but that is the utmost that could be said. According to the evidence, the property of the bankrupt at that date was not sufficient to satisfy the creditors, and it was only by reason of property subsequently falling in that there was a sufficiency. At the critical time the bankruptcy was a valid,

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.
(3) 10 Ch. D. 157.

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real, and effectual bankruptcy for all purposes. The case is not governed by any of the authorities to which we have been referred.

Solicitors for the Plaintiff: *Harper & Battcock.*
Solicitors for the Defendant: *Thompson & Groom.*

M. W.

C. A. 1891 NORTH, J. *April* 29. C. A. *June* 3.

In re WITHALL.

[1889 W. 2164.]

Solicitor—Scale Fee—Negotiation Fee—Commission—General Order under Solicitor's Remuneration Act, 1881, *Sched. I., Part I., r.* 11.

S. employed *H.* as general agent with a view to developing an estate as a building property, on the terms of his having a commission of 2½ per cent. on the purchase-money of all lands sold during his agency, and on the capitalized value of the rents of all leases granted during the same period. An offer was made for purchase at a time when *H.* was too ill to attend at his office, and the negotiation was conducted by *W.*, the solicitor of *S.*, but *H.* was consulted repeatedly and gave advice as to the sale which was ultimately completed. On completion *H.* was paid 2½ per cent. on the purchase-money. *W.*, in his bill of costs, claimed the scale fee for negotiating the sale, which claim was resisted on the ground that the vendor had paid a commission to an estate agent. The Taxing Master allowed the scale fee, being of opinion that as the commission paid to *H.* was not a payment in respect of this particular transaction but for general services, and would have been paid all the same if he had not intervened at all in the sale, it was not a commission within the meaning of the Solicitor's Remuneration Order, Sched. I., Part I., r. 11:—

Held, by *North*, J., that if *H.* had not been called in at all in this transaction, the payment of the commission, which would in that case have been a payment entirely in respect of other work, would not have been a payment of commission within the rule, but that as *H.* had assisted in the negotiation, he was paid for his assistance by the commission, although the commission also covered other work; that a commission, therefore, had been paid within the meaning of the rule, and that the scale fee for negotiation ought not to be allowed:

Held, by the Court of Appeal, that *North*, J., had put a correct construction on the rule.

IN 1874 Sir *Percy Shelley* engaged Mr. *Hankinson*, a local surveyor, to act in the general management of his estate at *Bournemouth*, with a view to its development as a building

property. His remuneration was to be 2½ per cent. on the capitalized value at twenty-five years' purchase of the rents received on all leases granted during his agency, and 2½ per cent. on the purchase-money of all lands sold during the same period.

On the 23rd of May, 1884, Sir *Percy* telegraphed to his solicitor, Mr. *Withall*—"Most important proposal for purchase here—parties all at *Bournemouth*, and are compelled to require answer by Monday. Can you come here to-morrow, or Sunday, or Monday? *Hankinson* very ill and not allowed to receive letters."

Mr. *Withall* on the 24th went to *Bournemouth* and conferred with Sir *Percy* and Lady *Shelley* as to negotiating the sale of a plot of twelve acres to the Conservative Land Society. On the same day he attended Mr. *Bazalgette*, the solicitor of the society, and asked £1600 per acre. On the 26th Mr. *Bazalgette* offered £1200 per acre, which was not accepted. Mr. *Withall* then conferred with Sir *Percy* and Mr. *Hankinson*, and on the 27th attended a meeting of the society, and agreed to accept £1200 per acre, subject to restrictive covenants, the nature of which was to be defined by Mr. *Hankinson*. The terms were finally agreed on between him and the society on the 1st of June.

Mr. *Hankinson* by affidavit stated as follows: "The original offer was, I am informed and believe, made direct to the said Sir *P. Shelley*, and the negotiations were in the first instance conducted by his solicitor, Mr. *Charles Withall*. I was at the time recovering from an illness and unable to go to my office, but Mr. *Withall* attended me on one or two occasions in company with the said Sir *P. Shelley* and Mr. *Bazalgette*, the solicitor to the said society, at my private house, and I assisted in the negotiations by preparation of plans and advising." On cross-examination he said: "I remember the sale in 1884 to the Conservative Land Society. I prepared plans for it in relation to the negotiations, pending the negotiation before the signing of the contract, and gave advice to Sir *Percy* and his solicitor in relation to the negotiations on almost every point that arose; for instance, as to what price should be asked, which would require local knowledge, which I possessed. I also advised that

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certain restrictions should be imposed as to building. I saw, and had letters from, Mr. *Bazalgette*, solicitor to the purchasers, pending the negotiations dealing with the points which arose. I also saw and corresponded with Mr. *Withall* thereon. Mr. *Withall* brought Mr. *Bazalgette* with him to my house on one occasion." On further examination he said: "I did nothing at all until Mr. *Withall* brought Mr. *Bazalgette* to me; that was the first I heard of it. After that there was something about the price between me and Mr. *Bazalgette*. I did not fix the price with Mr. *Bazalgette* of my own knowledge. I did not know who did."

On the completion of the sale Sir *Percy* paid Mr. *Hankinson*, according to the terms of his engagement, £360, being 2½ per cent. on the purchase-money.

The bill of Mr. *Withall* (who was dead) was now being taxed, and the question was whether he was entitled to be allowed the scale fee of £76 for negotiating the purchase. An objection having been taken to its allowance, the Taxing Master in his answer, after shortly stating the facts as to the negotiation, and the payment of the £360, said: "It appeared to me that this was not a payment in respect of this particular sale, which the surveyor neither effected nor negotiated, but for general services rendered as a retained estate agent and manager, who, instead of receiving an annual salary, was paid by a percentage, an arrangement calculated to give him a special interest in promoting the development of the estate, and that it was not such a payment as would disentitle the solicitor to his fee for a negotiation which he was specially retained to conduct, and did, in fact, successfully carry into effect, fixing the price and completing the contract. The position of the surveyor in regard to the sale was, in fact, that of a salaried agent, though, instead of an annual salary, he was paid by a commission; and I considered that the circumstances were not such as made the payment to him a payment to an 'estate agent or valuer' within the meaning of the Remuneration Order, rule 11.

"The magnitude of the fee paid to Mr. *Hankinson*, which is so greatly in excess of the ordinary surveyor's fee, is of itself sufficient to shew that it was not made in respect of this particular

sale, but for general services; and the agreement under which he made and was paid his commission would have equally entitled him to it, even if he had never been consulted about the sale or interfered in it."

The representative of Sir *Percy Shelley* applied to vary the certificate.

The summons was heard before Mr. Justice *North* on the 29th of April, 1891.

Cozens-Hardy, Q.C., and *D. L. Alexander*, for the summons:—

The conditions under which a scale fee is payable to the solicitor for negotiating the sale are not applicable, because the conditions under which it is payable were not performed—the solicitor did not perform the positive conditions necessary to entitle him to scale fee of arranging the sale and the price and terms and conditions thereof. Nor was the negative condition performed, that no commission should be "paid by the client to an auctioneer or estate or other agent": *In re Macgowan* (1). Here Sir *Percy Shelley's* general agent took a substantial part in the work of negotiating, and was paid by commission in respect of this and other work. We admit that Mr. *Withall* was entitled to a *quantum meruit*, and the matter may be referred back to the Taxing Master to fix such amount.

Warrington, for the Respondents:—

The negotiation was, in fact, carried out by the solicitor. And the commission paid to the estate agent, though measured to some extent by the sale price of the property in question, was really paid in respect of other work; it was, in effect, part of a salary.

NORTH, J.:—

I think in this case the Taxing Master has made a mistake. The question arises under the 11th rule, which says: "The scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price

(1) [1891] 1 Ch. 105.

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and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate, or other agent." [His Lordship read the passages from Mr. *Hankinson's* affidavit and cross-examination, set out above, and proceeded:—]

It seems to me, therefore, clear that Mr. *Hankinson* did take part in what went on with respect to the negotiations. Another party found the purchaser. I do not think that in itself material. If a vendor takes a proposed purchaser to his solicitor, and says: "This man wants to buy my property; you negotiate the terms of it with him for me;" the solicitor might earn the fee, although he did not find a purchaser in that sense. I do not think that the not finding the purchaser is the material point. But, in point of fact, what Mr. *Withall* did was to a certain extent to conduct the negotiation. In my opinion he did not entirely conduct the negotiation, and did not earn the fee. There were certain points he could not carry out himself. He was in communication with Mr. *Hankinson*, and a correspondence took place between them; and further than that, the arrangement come to was for a sale on terms and conditions which were settled by Mr. *Hankinson*. Under these circumstances, in my opinion, Mr. *Hankinson* was taking part in the negotiations and doing work for which, beyond all question but for the existing arrangement as to the mode of payment, he was entitled to be paid in some way, whether by commission or otherwise. If he had been called in on this one occasion alone, he might or might not have been paid by commission. I do not think, if he had been paid by commission, he would have received so large a commission as he got in the present case. But I do not see any reason to doubt that he might have been paid by commission. Although the negotiations were to a certain extent conducted by Mr. *Withall*, he did not entirely conduct them, and they were partly conducted by Mr. *Hankinson*.

Then it was said the words of the latter part of the rule prevent the fact of Mr. *Hankinson* having been consulted to some extent from applying to this case, because it was said the solicitor arranged the terms of the contract and no commission was paid in respect of the sale by the client to any auctioneer or estate or other agent. In my opinion commission was paid in

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respect to this very matter to Mr. *Hankinson*, he being the estate agent. It is quite true that, if he had not been called in at all, he still would have been entitled to this commission in respect of other work. And if he had not been called in or consulted at all on this occasion, the fact that he received for other work a payment measured by the amount realized by this sale would not, in my opinion, have made the payment a payment of commission within the meaning of the rule. But he did part of the business that was done between the time the parties came together and the time the contract was completed; he took a material and essential part in it, which I will not say Mr. *Withall* could not have done without him if it had been left to him alone; but it was not, and he was obliged to get the assistance of Mr. *Hankinson* for the purpose. Under these circumstances Mr. *Hankinson* was paid for that work beyond all question, and the bargain was that he was to be paid a commission upon it. In my opinion it was not the less a commission because the sum paid covered other work done in respect of other matters. The Taxing Master in his answer to objections says: "No doubt a payment was made to a surveyor, and if it were a payment made entirely in respect of this transaction no question could arise," and he uses the phrase in two other passages in the answers. I do not think it is essential that the commission paid should have been paid entirely in respect of the transaction in question. If commission was paid in respect of that transaction I think it immaterial whether the commission covers other things done by the agent or not. In my opinion the Taxing Master ought not to have allowed the solicitor the price which is given as a payment for all the work when part of the work was not done by the solicitor, and when it is impossible to say that the whole of the work was done by him without the intervention of the estate agent, who was paid commission.

Under these circumstances I think that the Taxing Master was wrong in allowing the £76, the scale fee. On the other hand, I think Mr. *Withell* was entitled to some payment for what he did, and as to that I understand his right to make out his bill with regard to these matters is not disputed.

D. P.

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Withall's executors appealed from this decision. The appeal was heard on the 3rd of June, 1891.

Warrington, for the Appellant:—

I contend that this is not a commission within the Solicitor's Remuneration Order, Sched. I., Part I., rule 11. To come within that rule the commission must be in respect of the particular transaction, a remuneration in respect of the sale. The beginning of rule 11 as to sales by auction shews this to be the case. Here the commission was not paid as remuneration for services in respect of the sale; it would have been paid just the same if *Hankinson* had not been privy to the sale at all. It was really salary, not commission. The scale fee for negotiating is therefore payable.

Cozens-Hardy, Q.C., and *D. L. Alexander*, for the representatives of Sir *Percy Shelley*, were not called upon.

LINDLEY, J.:—

I think that the construction which Mr. Justice *North* put upon rule 11 was the right one, and that the Taxing Master made a mistake in considering that the commission was not a commission within the meaning of the rule unless it was paid in respect of the particular sale. The *London* solicitor conducted the negotiation for the sale, in which he would require the assistance of a person with local knowledge. Mr. *Hankinson* gave his services about this very matter, and it may have been to a great extent owing to his advice that the negotiation was brought to a successful conclusion. He was paid for this, and paid by a commission, and it is nothing to the purpose to say that the commission was in part a remuneration for other services, and that Mr. *Hankinson* would have received it all the same if he had not taken any part in this sale. He did act in this sale and was paid a commission, and the case is within the scope and meaning as well as the words of rule 11. The appeal will be dismissed.

BOWEN, and FRY, L.JJ., concurred.

Solicitors: *Hays, Schmettau & Co.; Blake & Heseltine.*

H. C. J.

WESTMORELAND GREEN AND BLUE SLATE COMPANY *v.* FEILDEN.

[1889 W. 2894.]

C. A.
1891
KEKEWICH, J.
March 4, 5, 11.
C. A.
June 11, 12.

Company—Contributory—Calls—Winding-up—Balance Order—"Final Judgment"—Right of Action—Original Debt—Specialty Debt—Merger of Old Remedy in New—Jurisdiction—Companies Act, 1862, *ss.* 75, 101, 102, 120 [*Revised Ed. Statutes, vol. xiv., pp.* 219, 225, 228].

Held by *Kekewich*, J., following *Chalk, Webb & Co.* v. *Tennent* (1), that an action to enforce a balance order made under sect. 101 or sect. 102 of the *Companies Act*, 1862, for calls made before or in the winding-up of a limited company, cannot be maintained.

But *held*, by *Kekewich*, J., and by the Court of Appeal, that where calls have been made before the winding-up, and, after the winding-up the company brings an action, on a writ specially indorsed, for payment of those calls, that action may be maintained notwithstanding that a balance order has been made in the winding-up for the amount of the calls; the right of action in respect of the calls as an original debt not being merged in or destroyed by the balance order.

A balance order under the *Companies Act*, 1862, is not a "judgment."

The nature of a balance order discussed.

THE *Westmoreland Green and Blue Slate Company, Limited*, was incorporated on the 19th of April, 1886, with a nominal capital of £30,000 in 6000 shares of £5 each. On the 28th of April, 1886, the Defendant, Colonel *Montague Joseph Feilden*, sent in an application for 200 shares, which were allotted to him by the directors at a board meeting held on the 26th of June, 1886, and a resolution was thereupon passed on the same day appointing him a director. Subsequently, on one occasion at least he attended a board meeting and voted, and on various occasions he wrote letters to the secretary on the footing of his being a director, and excusing his non-attendance at board meetings. On the 3rd of December, 1886, he paid his application money, £200, being £1 per share.

On the 14th of July, 1888, an order was made to wind up the company compulsorily on its own petition, and an official liquidator was appointed. On the 15th of March, 1889, the

(1) 36 W. R. 263; 57 L. T. (N.S.) 598.

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Chief Clerk made his certificate in the winding-up, settling the Defendant on the list of contributories in respect of 200 shares. On the 7th of May, 1889, the Chief Clerk, upon the application of the official liquidator, made a balance order against the Defendant for payment to the official liquidator of £884 8*s.* 1*d.*, being the amount due on allotment of his 200 shares, and for three calls made by the directors before the winding-up and for interest on the calls up to the 20th of March, 1889. In the order the Defendant was described as of "*Catford House, Catford, Kent.*" His solicitors attended on his behalf before the Chief Clerk upon the hearing of the application. At that time he was residing in *Guernsey*, and some difficulty was therefore experienced in serving the balance order; but it was eventually served upon him in *Guernsey* on the 10th of August, 1889. That service was, however, set aside on the 16th of August as being out of the jurisdiction, and accordingly it appeared that during his absence in *Guernsey* the Defendant could not be served with the balance order at all. In these circumstances the company, on the 20th of September, 1889, issued the writ in this action, leave being obtained to serve the writ on the Defendant in *Guernsey*. The writ was specially indorsed with a claim "for money due on allotment of, and for calls upon, 200 shares held by the Defendant in the Plaintiff company, and interest thereon. The following are the particulars." Then followed the details of the amount of the claim, the total being £884 8*s.* 1*d.*—that is to say, the same sum as that stated in the balance order. And the Plaintiff company further claimed interest at 10 per cent. on £800, part of that sum.

On the 26th of November, 1889, the company obtained summary judgment in the action for the £934 14*s.* 1*d.* with £31 0*s.* 2*d.* for costs; but on the 16th of January, 1890, the judgment was, upon the Defendant's application, set aside, and leave was given him to defend, he having paid the £965 14*s.* 3*d.* into Court. He then delivered a defence alleging that the allotment of the shares and also the calls were invalid, on the ground, among other reasons, that the directors were not duly qualified to act; and as a further ground of defence he alleged that the action was, in fact, an action to enforce the balance order, and

that the Plaintiff company was not entitled to maintain such action. He also counter-claimed to have the register of shareholders rectified by expunging his name therefrom. In reply the Plaintiffs denied that there was any ground for rectification, and pleaded delay and acquiescence.

The action came on for trial before Mr. Justice *Kekewich* on the 4th of March, 1891.

Renshaw, Q.C., and *Bramwell Davis*, for the Plaintiffs:—

As the defence raises a plea of jurisdiction, challenging our right to sue at all, on the ground that the action is one to enforce a balance order, that question must be disposed of first. Our contention is that we are not suing on the balance order at all, but on the original debt, which distinguishes this case from that of *Chalk, Webb & Co.* v. *Tennent* (1), which will, no doubt, be relied on by the other side, and where Mr. Justice *North* held that a company could not maintain an action to enforce a balance order.

[KEKEWICH, J.:—If you are not suing on the balance order, you are suing simply as creditor ?]

Yes; we are suing for a legal debt on a specially indorsed writ. In the case before Mr. Justice *North* there was an important fact which is omitted from the report in the *Weekly Reporter*, but which appears in the *Law Times* report and also in *In re Tennent* (2), namely, that the balance order there in question was in respect of calls made in, and not before, the liquidation of the company. That, we submit, is the key to Mr. Justice *North's* decision. Here the balance order was in respect of calls made before the liquidation, and therefore that decision does not apply. Again, in the case before Mr. Justice *North* the balance order was made under the special remedy given by sect. 102 of the *Companies Act*, 1862, whereas here it was made under sect. 101, which, no doubt, gave us a new right and special remedy, but did not destroy our existing legal right. Looking at the two cases cited by the learned Judge, *Carpenter* v. *Thornton* (3) was the case of an action at law for the recovery of an

(1) 36 W. R. 263; 57 L. T. (N.S.) 598. (2) 17 Q. B. D. 357.
(3) 3 B. & Al. 52.

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equitable debt created by a decree of a Court of Equity, and it was held such an action could not be maintained. However, *Abbott*, C.J., did express an opinion that a Court of law would lend its aid to enforce a decree of the Court of Chancery under which a precise sum had been found due. So in the other case, *Bailey* v. *Bailey* (1), it was held that as an action of law would lie only upon a legal claim it could not lie upon an order for alimony, which was not a legal debt, but an equitable debt only, enforceable under a special statute. Again, in *Berkeley* v. *Elderkin* (2) it was held that no action would lie upon the judgment of a County Court. It seems evident, therefore, that Mr. Justice *North's* decision must have been based upon the principle that, the calls in question before him having been made under the special remedy given by sect. 102 of the *Companies Act*, 1862, they could only be recovered under that statute. The principle is that where new rights are given with specific remedies, the remedy is confined to those specifically given: *Hutchinson* v. *Gillespie* (3). In the present case the calls, being all made before the winding-up, are "of the nature of a specialty" under sect. 75 of the *Companies Act*, and are recoverable as a common law debt; and we are simply suing for a common law debt in a common law action, and not for a debt under a balance order at all, although the debt is for the same amount as the balance order. The *Companies Act*, 1862, was never intended to take away existing rights, and Mr. Justice *North's* decision amounts merely to this, that you cannot sue on a balance order alone.

Warmington, Q.C., and *Butcher*, for the Defendant:—

We ask your Lordship to follow Mr. Justice *North's* decision, which has never been questioned. We say, first, if the Plaintiffs are suing on the balance order, that decision is against them; secondly, if they are not suing on the balance order, their right is lost altogether, since the balance order has destroyed the original debt. A balance order, though made by a Court of Equity, is enforceable in the same way as a judgment at law: 1 & 2 Vict. c. 110, s. 18; Rules of Supreme Court, 1883, Order XLII., rule 24.

(1) 13 Q. B. D. 855. (2) 1 E. & B. 805.
(3) 11 Ex. 798.

It is to all intents and purposes a "judgment," and the effect of it is that the party who obtains it places himself in a new position, the old obligation being gone and a new obligation and new remedies being substituted for it: the old obligation is merged in the new. Having thus chosen the new remedy, he loses the other: *Cambefort & Company* v. *Chapman* (1). Here the liquidator need not have applied for a balance order at all; he might have relied upon the original legal obligation created by the contract to take shares; but, having got his balance order, he cannot say, "I don't like this; I will go back to my old remedy." As regards the observations relied on by the other side of *Abbott*, C.J., in *Carpenter* v. *Thornton* (2), that learned Judge goes no further than to say that in the circumstances mentioned a Court of law "might perhaps" lend its aid to enforce the decree of the Court of Chancery; and certainly no case can be found in which, since 1 & 2 Vict. c. 110, judgment has been given at law for the purpose of enforcing an order made in a Court of Equity; in fact, that statute renders such a proceeding unnecessary.

Renshaw, in reply:—

I agree that if we were suing on the balance order Mr. Justice *North's* decision would put us out of Court. Sect. 120 of the *Companies Act*, 1862, appears to supplement sect. 18 of 1 & 2 Vict. c. 110, by providing that "all orders made by the Court of Chancery under this Act shall be enforced in the same way as orders made by that Court in any suit"; that is to say, that they shall have the same effect as judgments at law. But the important point in the present case is that the calls comprised in the balance order were made before the winding-up; and it has been decided in *Ex parte Whinney* (3), that a balance order for calls made before a winding-up is not "final judgment," therefore our original common law right of action cannot have merged in that order. If the Defendant's plea is right we, the creditors, are really without a remedy.

KEKEWICH, J.:—This point will require consideration; but as

(1) 19 Q. B. D. 229. (2) 3 B. & Al. 52.
(3) 13 Q. B. D. 476.

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I understand the witnesses are here, I will hear the whole case out *de bene esse.*

[His Lordship then proceeded to hear the evidence, and came to the conclusion upon the merits that the Defendant had been properly placed upon the list of contributories for the 200 shares, and was liable for the amount claimed by the action in respect of them. As to the other point, his Lordship reserved judgment.]

1891. March 11. KEKEWICH, J.:—

It is objected by the Defendant that this is in fact an action to enforce the balance order of the 7th of May, 1889, and that the Plaintiff company is not entitled to maintain such action. The objection concedes that the action is not, in form, of the character alleged, and in pleading form is all-important; but it is better to consider the question of substance—whether the Plaintiff company is entitled to maintain an action to enforce the balance order. I think not. Mr. Justice *North* so decided in *Chalk, Webb, & Co.* v. *Tennent* (1), and although there is a clear distinction between that case and this, yet, in my judgment, the grounds on which Mr. Justice *North* appears to have based his decision must also govern mine. That was in form an action by the Plaintiff company to enforce a balance order against the Defendant, and Mr. Justice *North* held it not maintainable. The case is shortly reported both in the *Weekly Reporter* and *Law Times*, and I have been unable to obtain any further information about it. Notwithstanding, however, that according to these reports the learned Judge gave no reasons for his decision beyond a reference to two authorities, that reference is sufficient to shew what the grounds of his decision were. One of these authorities is *Bailey* v. *Bailey* (2). It was there held that an order to sign final judgment under Order XIV. will not be made where the action is for alimony *pendente lite* payable under an order of the Probate and Divorce Division. In giving judgment the Master of the Rolls said: "It is an old and well-known rule of construing statutes, that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be

(1) 36 W. R. 263; 57 L. T. (N.S.) 598. (2) 13 Q. B. D. 855, 859.

supposed to exist;" and he proceeds to quote the section of the statute giving the Divorce Court power to enforce its orders. That section of that statute is in substance the same as the 120th section of the *Companies Act*, 1862, and by parity of reasoning an order made by the authority of the latter statute and enforceable thereunder is not a ground of action. I cannot doubt that Mr. Justice *North* referred to this when quoting *Bailey* v. *Bailey* (1).

It is urged that in this case the calls were made by the company before the winding-up, and that the balance order depends on sect. 101 of the *Companies Act*, 1862; whereas, in *Chalk, Webb, & Co.* v. *Tennent* (2), the calls were made in the winding-up under sect. 102; but sect. 120 applies to both, and so does, therefore, Mr. Justice *North's* decision.

The other authority referred to by him is *Carpenter* v. *Thornton* (3). It so happens that the principle of that case was also under discussion in *Bailey* v. *Bailey*, and it is also expounded by the Master of the Rolls and Lords Justices *Bowen* and *Fry*. The latter sums up the point thus (4): "An action at law would lie only upon a legal claim, and an order for the payment of alimony is, pursuant to statute, enforceable only as an equitable and not as a legal debt." That ground also, having regard to the *Companies Act*, 1862, s. 120, holds good here, and defeats the action as one to enforce the balance order. With this decision to guide me there is no occasion to refer to the Act of 1 & 2 Vict. c. 110, or to Order XLII., rule 24, nor need I consider how far in other respects an order of the Chancery Division is equivalent to a judgment at law.

The Plaintiffs fall back on the original debt in respect of calls on the Defendant, and, indeed, say that this is the foundation of their action; to which the Defendant replies that, having obtained a balance order which may properly be styled a judgment for those calls, their remedy by action is gone. That calls constitute a debt cannot be doubted. They probably would be a debt independently of statute, and they are expressly made a specialty by the *Companies Act*, 1862, s. 75.

(1) 13 Q. B. D. 855.
(2) 36 W. R. 263; 57 L. T. (N.S.) 598.
(3) 3 B. & Al. 52.
(4) 13 Q. B. D. 860.

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But the Defendant seeks to apply the principle expounded by *Parke*, B., in the judgment of the Court of Exchequer in *King* v. *Hoare* (1), where, as noticed by Lord *Penzance* in *Kendall* v. *Hamilton* (2), not only is the law stated, but the reasons for it are given. It is enough to quote a few words of *Parke*, B. He says: "The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher." In my opinion that rule has no application to a balance order. True it is that the balance order is matter of record, but it does not fulfil the conditions of a judgment. In *In re Tennent* (3), a balance order was held not to be a final judgment within the meaning of sub-sect. 1 (*g*) of sect. 4 of the *Bankruptcy Act*, 1883; it does not prevent an executor from retaining his own debt out of his testator's assets; and according to the authorities which I have followed on the first point, it cannot be sued upon. It may be used for the purpose of obtaining a writ of *ne exeat*, but that is because such a writ was a remedy of the Court of Chancery, and is therefore directly within the language of the *Companies Act*, 1862, s. 120. To hold that the rule which I have quoted from *King* v. *Hoare* applies to a balance order would be to extend that rule to cases not contemplated by it, and to merge the original right of action in a remedy which cannot properly be styled of a higher nature. It was urged that on this point, as well as the first, Mr. Justice *North's* decision in *Chalk, Webb, & Co.* v. *Tennent* (4) is conclusive in favour of the Defendant. There, as already mentioned, the plaintiffs sued on the balance order, and on the plaintiffs' counsel asking leave to amend so as to claim judgment for the debt, Mr. Justice *North* refused it. He did so (according to the report) because he thought the plaintiffs not reasonably right in bringing the action. It would be straining the learned Judge's language to treat him as having decided that, the balance order having been made, an action for debt was not maintainable. I cannot help thinking that, if this had been his view, it would have been expressed more clearly, and that there must have been something in the case not disclosed by the report which led

(1) 13 M. & W. 494, 504.
(2) 4 App. Cas. 526.
(3) 17 Q. B. D. 357.
(4) 36 W. R. 263; 57 L. T. (N.S.) 598.

him to conclude that in no event had the plaintiffs a reasonable chance of success.

I therefore hold that the Plaintiff company is entitled to maintain this action as an action of debt; and, having already heard the evidence and decided the case in the Plaintiffs' favour on the merits, I also hold that they are entitled to judgment, with costs.

G. I. F. C.

The Defendant appealed from this decision. The appeal came on for hearing on the 11th of June, 1891.

Warmington, Q.C., and *Butcher*, for the Appellant:—

This action cannot be maintained. It is an action to enforce a balance order, and it was decided in *Chalk, Webb & Co.* v. *Tennent* (1) that such an action cannot be brought. It is said that these calls were all made before the winding-up, and that this action is brought upon the previous obligation to pay the calls; but that obligation is merged in the balance order. A balance order has the force and effect of a judgment, and the Plaintiff therefore cannot go back to the debt or obligation on which it is based: *Companies Act*, 1862, ss. 102, 103, 105, 120; 1 & 2 Vict. c. 110, s. 18; *In re Hubback* (2); *King* v. *Hoare* (3); *Farmer* v. *Mottram* (4).

A balance order is by virtue of 1 & 2 Vict. c. 110, s. 18, Rules of Supreme Court, 1883, Order XLII., r. 24, enforceable in the same way as a judgment at law, and is to all intents a judgment. The original debt then is merged in the judgment: *King* v. *Hoare*; *Cambefort & Co.* v. *Chapman* (5). All the tests of a judgment causing a merger which are given in *King* v. *Hoare* are found here. *In re Hubback*, which appears to be against us, is distinguishable, for there the decision only was that an order which directed payment out of a testator's assets in a due course of administration did not preclude the executor's right of retainer.

(1) 36 W. R. 263; 57 L. T. (N.S.) 598.
(2) 29 Ch. D. 934.
(3) 13 M. & W. 494, 504.
(4) 6 Man. & G. 684.
(5) 19 Q. B. D. 229.

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[FRY, L.J.:—The remedy for the original debt is larger than the remedy under the balance order. The Defendant cannot be proceeded against under the balance order out of the jurisdiction. Can there be a merger in an order which gives a less extensive remedy? *Ansell* v. *Baker* (1).

LINDLEY, L.J.:—Can you find any case where a summary order made under a discretionary statutory jurisdiction has been held to cause a merger?

BOWEN, L.J.:—Technically it would be curious if a debt due to the company could merge in an order to pay the liquidator.]

Surely payment under the balance order must extinguish the debt. An action cannot be brought on a judgment of a county court; but such a judgment will be a bar to an action for the same demand in the superior Courts: *Berkeley* v. *Elderkin* (2); *Austin* v. *Mills* (3). The liquidator having taken one course cannot turn round and take another; he cannot be allowed to take two proceedings for the same demand. There is a novation, one mode of proceeding having been taken in lieu of the other; or, if not novation, it is a final election of the remedy. The liquidator was not bound to apply for a balance order; but having obtained it he cannot go back to his original remedy.

[LINDLEY, L.J.:—Can this be considered a final order? *Nouvion* v. *Freeman* (4).

FRY, L.J.:—It appears to me that there is nothing to prevent the liquidator from obtaining a further balance order to give him interest at £10 per cent. until the payment of the principal.]

An order must be considered final when it makes the matter *res judicata* between the parties, so that it cannot be agitated again. Here sect. 106 makes the balance order conclusive as to what is due.

Renshaw, Q.C., and *Bramwell Davis*, for the company, were not called on.

(1) 15 Q. B. 20.
(2) 1 E. & B. 805.
(3) 9 Ex. 288.
(4) 15 App. Cas. 1.

LINDLEY, L.J. :—

The point taken by the Appellant has been ingeniously argued, but the more closely it is looked into the more clearly it is seen that there is no substance in it. The action is brought by a company which is now in course of winding-up to enforce payment of calls made before the winding-up. These calls according to the articles of association bear interest at £10 per cent., and the *Companies Act*, 1862, sect. 16, enacts that all moneys payable by any member to the company in pursuance of any of the regulations of the company shall be in the nature of a specialty debt. Assuming then that the Appellant was a member of the company, and that the calls were duly made, they constitute a specialty debt due from him. The liquidator then brings an action for them in the name of the company. What is the answer? "You the liquidator got a balance order, and that precludes you from suing in respect of the original debt." Now what is the history and nature of balance orders? A balance order is made under provisions in the *Companies Act*, which confer on the Court the power of making summary orders for the purpose of getting in the estate. It is not contended that the remedy by balance order is the sole remedy, it is not disputed that the liquidator is not bound to resort to it. In former times the Court often refused to make a balance order, and directed the liquidator to bring an action. But it is said that though the liquidator was not bound to resort to this remedy, he did resort to it and obtained an order, and that the original right of action is merged in the order. Now is there any merger? The more closely the matter is looked into the more clear it appears that technically there cannot be a merger. The balance order is an order for payment to the liquidator, not to the company. That is a technical ground; but behind it there is matter of substance. The liquidator has recourse to the summary process, it turns out that the Appellant is abroad, so the balance order is worthless. It is contended that as the liquidator has got this order he must rely on it alone and make the best of it, that the right of action is merged in the order, and that no action can be brought. I have looked carefully into the cases and can find none where a mere summary order has been held to produce a merger. Such

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an order as this is not like a judgment. It has been urged that it is a judgment because it can be enforced by a writ of *fi. fa.* But if we look at sect. 106 of the Act we see clearly that, though a balance order can under sect. 120 be enforced by *fi. fa.*, in which respect it resembles a judgment, it resembles it in nothing else. It is said that the liquidator had a right to elect whether to proceed by action or by balance order, and must be bound by the election which he made; but an election is not binding which is made in ignorance of material facts. It was said that it is vexatious to sue a person twice in respect of the same demand. If the liquidator were guilty of vexation the Court would set the matter right in dealing with the costs; but there is no vexation here in resorting to a second proceeding when the first is made abortive by the Appellant being out of the jurisdiction.

BOWEN, L.J.:—

I am of the same opinion. This is an action for calls which were made before the winding-up, and for which the Defendant is a debtor to the company. He contends that the balance order bars the action. He says that the liquidator has obtained an order which, under 1 & 2 Vict. c. 110, s. 18, makes him a judgment creditor, and that the debt merges in the judgment. But there cannot be a merger in a case like the present. Merger is intended to operate where a higher remedy is acquired which is co-extensive with the original demand, as is shewn by the cases cited in *Boaler* v. *Mayor* (1). How can that apply when the higher remedy is not between the same parties? The original debt is payable to the company, the sum payable under the balance order is payable to the liquidator, so there cannot be a merger at law. This is technical, but behind the technicality there is substance. The truth is that a balance order is not in the nature of a judgment, but is a mere direction given by the Court for the better getting in an asset. This is plain from sects. 98, 99, 102, 103, and especially 106, which provides that the order shall be conclusive evidence that the money is due.

(1) 19 C. B. (N.S.) 76.

Due to whom? There cannot be a merger when the order is not for payment to the company.

It was urged that there was a novation; but novation can only arise from agreement, and it cannot be urged that there was any agreement in the present case.

Another argument was that it was the intention of the statute that the pursuing the remedy given by the statute should constitute a final election to rely on that remedy alone. If the statute had said this, either expressly or by implication, we should be obliged to give effect to its intention. One argument that such was the intention was that payment under the balance order would extinguish the debt. That does not in the least tend to shew that the statutory remedy and the original debt cannot be co-existing. If a collateral security is taken for a debt, payment under the collateral security extinguishes the debt, but until payment they are co-existing.

It was urged that the creation of this new remedy carries with it the consequence that it must be the sole remedy. That is not so. When a statute creates a new right, and gives a remedy for enforcing it, that remedy is generally, though not necessarily, exclusive, the question being in all cases one of construction of the Act. Where there is a right independently of the statutory remedy, the statute may take away the old way of enforcing it, or confine the party to a particular mode of enforcing it; but the mere giving a fresh remedy does not debar a party from suing in the old way, and there is nothing else here. A common law right to sue for these calls existed, and to help the getting in of the assets a summary remedy is given to which the liquidator is not bound to resort. Neither the giving this remedy nor the resorting to it can displace the old right to sue.

In my opinion, then, there is in the present case no merger, and no statutory displacement of the original right to sue. A machinery is provided, not for the purpose of doing away with any old rights, but for the purpose of giving a summary mode of enforcing them. If both modes were resorted to in a vexatious manner, the Court would know how to deal with the case; but no case of vexatious proceedings can be made out here.

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FRY, L.J.:—

I cannot usefully add anything to the observations of the Lords Justices. I concur in all that they have said.

The case was then proceeded with on the questions whether the Appellant was properly on the list of contributories, and whether the calls had been duly made. The Court came to a conclusion adverse to the Appellant on both points, and dismissed the appeal.

Solicitors: *S. S. Seal*, agents for *Wade & Co., Bradford; Harper & Battcock.*

H. C. J.

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In re PORTUGUESE CONSOLIDATED COPPER MINES, LIMITED. *Ex parte* LORD INCHIQUIN.

Company—Director—Qualification Shares—Contributory.

On the 22nd of October, 1888, Lord *I.* was appointed an original director of a company whose articles provided that each director should hold, at least, forty shares in the company. At a meeting of some of the directors, held on the 25th of October, 1888, forty shares were, without his knowledge, allotted to him, and before he ever acted as a director his name was placed on the register in respect of those forty shares. He had never applied for these shares, and, according to his evidence, he never knew until after the company was ordered to be wound up that these shares had been allotted to him or registered in his name. He first acted as a director on the 28th of November, 1888, and he next so acted on the 16th and 18th of January, 1889. On the 19th of January, 1889, he acquired by transfer forty fully paid shares in the company which were duly registered in his name, and on the 28th of January he retired from the board.

The company was afterwards ordered to be wound up, and upon an application to remove Lord *I.'s* name from the list of contributories in respect of the forty shares allotted to him on the 25th of October, 1888, it was held by *North*, J., that his name was properly on the register in respect of them, at any rate from the time when he first acted:—

Held, by the Court of Appeal (affirming the judgment of *North*, J.),

(1) that Lord *I.* must be taken to have known that it was his duty to qualify for the office of director by taking forty shares within a reasonable time, and (2) that a reasonable time had elapsed, if not by the 24th of November, 1888, at all events, before the 19th of January, 1889.

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APPEAL from Mr. Justice *North*.

The *Portuguese Consolidated Copper Mines, Limited*, was registered on the 20th of October, 1888, having a capital divided into £10 shares. The articles of association of the company provided (article 70) that, subject to agreement, the shares should be allotted by the directors to such persons, at such times, on such terms, and in such manner as they should think proper; (article 75) that the qualification of a director should be the holding of at least forty shares in the company; and (article 80) that the first directors should be appointed by a majority of the subscribers to the memorandum of association.

On the 22nd of October, 1888, Lord *Inchiquin* was appointed one of the first directors of the company. By the minutes of a meeting of some of the directors other than Lord *Inchiquin*, held on the 25th of October, 1888, it appeared that forty unpaid shares were on that day allotted to Lord *Inchiquin*; and his name was placed on the register of shareholders in respect of these shares before the 24th of November, 1888. Lord *Inchiquin* first acted as a director on the 24th of November, 1888, when he attended a meeting of directors and acted as chairman. He attended subsequent meetings of the directors on the 16th and 18th of January, 1889, and on the 19th of January, 1889, he acquired by transfer forty fully paid up shares in the company, which were transferred to him and were registered in his name. On the 28th of January, 1889, he retired from the board of directors. The company was afterwards ordered to be wound up, and Lord *Inchiquin's* name was placed upon the list of contributories in respect of the forty unpaid shares allotted to him on the 25th of October, 1888. This was a summons taken out by him to have his name removed from the list in respect of these shares, and in support of it he made an affidavit to the effect that he had no knowledge till after the commencement of the winding-up that any shares had been allotted to him, or that his name ever was on the register of shareholders in respect of

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any shares other than the forty fully paid-up shares transferred to him in January, 1890.

The summons was adjourned into Court and heard before Mr. Justice *North* on the 23rd and 24th of April, 1891.

Cozens-Hardy, Q.C., and *R. C. Saunders*, for Lord *Inchiquin*:—

Lord *Inchiquin* was not affected with notice of what was placed on the minute-books of the company before he acted; he is therefore not bound to take the shares by any acquiescence on his part: *In re Denham & Co.* (1); he had a reasonable time within which to acquire his qualification shares; he did acquire them in a reasonable time and is liable in respect of no shares other than the paid-up shares. The result of the decisions is that a director is allowed a reasonable time before acting to acquire his qualification shares, that if, after a reasonable time before acting has expired, or before he acts, his name is placed on the register of shareholders, he is deemed to have notice of the fact and bound to take the shares: *Leeke's Case* (2); *Brown's Case* (3); *Miller's Case* (4).

Beddall, for the liquidator:—

For some purposes a director is not affected according to *In re Denham & Co.* with notice of what is on the books of his company, but the case does not overrule the decisions that a director is to be deemed to have contracted to take his qualification shares when his name is placed on the register of shareholders by having accepted the office, and *a fortiori* by acting: *Hewitt's Case* (5); *In re Wheal Buller Consols* (6).

Cozens-Hardy, in reply.

April 24. North, J.:—

With respect to the forty fully paid-up shares no question arises, but Lord *Inchiquin* has been placed on the list in respect of forty shares which, according to the articles of the

(1) 25 Ch. D. 752.
(2) Law Rep. 6 Ch. 469.
(3) Ibid. 9 Ch. 102.
(4) 3 Ch. D. 661.
(5) 25 Ch. D. 283.
(6) 38 Ch. D. 42.

company, are the necessary qualification of a director and which he never took unless those forty fully paid-up shares transferred on the 19th of January, 1889, can be taken to be such compliance with what was necessary as to qualification. In my opinion it is clearly settled by the authorities that it was not, and he must remain on the list in respect of the forty shares in question.

There are many authorities on the point: I intend to refer to only two or three. The first is a decision of the Court of Appeal in *Brown's Case* (1), where Lord *Selborne* says (2): "The other authorities are all cases in which, as a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered, when a director tried to get rid of the shares actually registered in his name, that he had accepted the office of director, which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact, that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification—that that act was done by his authority, and that he could not be allowed to repudiate it. For my part, I see no reason to doubt that the various cases which arose on that state of circumstances were well decided." Then a little further on he says: "The true result to be drawn from those authorities appears to be, that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification." Then the next case is *Miller's Case* (3), in which the late Master of the Rolls says (4): "I

(1) Law Rep. 9 Ch. 102.
(2) Ibid. 106.
(3) 3 Ch. D. 661.
(4) Ibid. 665.

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North, J.

take it to be settled by *Brown's Case* (1), that where the qualification is not necessary at the time of election (though generally the qualification is indispensable as a preliminary to election, and the election is void if the man has no qualification), but where it is not indispensable to election, the director has a reasonable time for acquiring the qualification, either from the company or anybody else, but he must acquire it before he acts. Although he may abstain from acting for a reasonable time, still if he abstains from acting for a very long time he is liable; he is equally liable if he acts—the time ceases to run when he acts,"—that is to say, what is called a reasonable time for acquiring shares ceases to run when he acts. "Again, I take it to be also settled in *Brown's Case* that if in the ordinary course of the business of the company he is registered in their books as a shareholder, the agreement which the man enters into by becoming a director to take the qualification is a sufficient authority for the registration, and therefore he is a duly registered shareholder whether he knew of the registration or not." Then again in a later case, *Brett's Case* (2): the law is laid down in the same way. In that case the person who was alleged to be a director was held not to be liable for this reason, that not only was he not registered in respect of any shares, but they had not even been allotted to him, whereas in the present case an allotment was made, and Lord *Inchiquin* is on the register. Lord Justice *Kay*, who decided the case in the Court below, says (3), "The cases on this subject seem to be divisible into the following classes"; and then he says the second class is this, "where, after accepting and while he is director, shares have been registered in his name, and there he is presumed to know what was done, and to have accepted such shares."

Then in the judgment of the Court of Appeal given by Lord Justice *Cotton*, the same view precisely is taken, because, referring to the cases cited for the liquidator, he says (4): "But it will be found that when the directors have been held liable, either the shares had been entered in the register or treated as allotted in the other books of the company."

(1) Law Rep. 9 Ch. 102.
(2) 25 Ch. D. 283.
(3) 25 Ch. D. 286.
(4) Ibid. 295.

Then, lastly, in the recent case of *In re Wheal Buller Consols* (1), Lord Justice *Cotton* says (2): "A director may estop himself from disputing his being a shareholder, as where a director without his knowledge was entered on the register for the qualification shares, and was held to be fixed with them because he, being a director, must be presumed to have known of the entry."

Now, with reference to the last two cases. It was said that they shew that a director must be presumed to know of his name being entered on the register, and here there is evidence that Lord *Inchiquin* did not know of it. He so states, and I accept his statements. I do not throw any doubt upon the accuracy of what he says; but it is quite clear from reading those cases that when they speak of its being presumed, what is meant is that the entry is *primâ facie* evidence, because the very words I have quoted from Lord Justice *Cotton's* observations in the last case are, "when a director without his knowledge was entered on the register," and that therefore is the very case he is dealing with. All these cases, therefore, shew that Lord *Inchiquin* is to be held bound. It was not disputed that he was bound by all that took place, and that he is necessarily on the list of contributories but for this. It was said that his position is altered by the fact that the transfer of fully paid-up shares was taken on the 19th of January, 1889, and that that alters the case. I do not see how it can alter it in any way. According to the cases I have cited, what he must do is this: he must have the shares before he acts, at any rate—and here he had been acting for nearly two months before these shares were acquired. The point suggested on his behalf, that he took those paid-up shares within a reasonable time has no application when one remembers, as Sir *George Jessel* pointed out, that the reasonable time was a time before acting, and the reasonable time has come to an end, and cannot be looked for after he has once acted.

Then another case of *In re Denham & Co.* (3), before Mr. Justice *Chitty*, was cited, in which he made some observations about what a director has or has not notice of. If he said anything in opposition to what is decided by the cases I have referred to, of course I must attend to those cases in the Court of Appeal, and

(1) 38 Ch. D. 42. (2) 38 Ch. D. 49. (3) 25 Ch. D. 752.

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not to what he said; but I do not so read his judgment, and I do not think any other judge ever has said anything inconsistent with those cases, which shew to my mind conclusively that Lord *Inchiquin* must be taken to have been properly on the register in respect of those forty shares at any rate from the time he first acted.

D. P.

From this decision Lord *Inchiquin* appealed. The appeal was heard on the 15th of June, 1891.

Cozens-Hardy, Q.C., and *R. C. Saunders*, for the Appellant:—

The obligation of a director to acquire qualification shares is satisfied by his acquiring a sufficient number of shares from an outsider: *Brown's Case* (1); and there is no decision that he must acquire them either before he acts or immediately after he acts. His only contract or obligation is to acquire them within a reasonable time, and what a reasonable time is depends upon the facts in each particular case. It must be admitted that if Lord *Inchiquin* had not acquired the fully paid-up shares on the 19th of January, 1889, he must have been a contributory in respect of the others, but by doing so he discharged his obligation within a reasonable time, and his name ought not to be continued on the list of contributories in respect of the unpaid shares, which he never agreed to take, merely because some officer of the company, without his authority and without his knowledge, put his name upon the register for forty shares for which he had never applied: *In re Denham & Co.* (2); *Steele's Case* (3); *Ex parte Badman & Bosanquet* (4); *In re Wheal Buller Consols* (5); *Miller's Case* (6); *Brett's Case* (7).

Beddall, for the liquidator, was not called upon.

LINDLEY, L.J. (after stating the facts of the case, continued):—

I suppose Lord *Inchiquin* was appointed a director in pursuance

(1) Law Rep. 9 Ch. 102.
(2) 25 Ch. D. 752.
(3) 42 Ch. D. 160.
(4) 45 Ch. D. 16.
(5) 38 Ch. D. 42.
(6) 3 Ch. D. 661.
(7) 25 Ch. D. 283.

of that 80th clause of the articles of association. He has made an affidavit as to the fact that he did not know that any of the forty shares allotted to him on the 25th of October, 1888, had been allotted to him. He does not in terms, or in express or clear language, say that he did not know that those shares were on the register in his name, but I think that on the fair construction of his affidavit, and in the absence of any evidence to the contrary, he meant to go that length. I certainly am not prepared to say offhand, without looking into the cases more carefully than I have done during the course of this discussion, whether the mere fact of the shares being registered in his name was notice to him of their being so registered. I shall proceed on the assumption that, as notice to him has not been proved, he did not know. The fact is that he became a director with his own sanction. He knew that he was a director, he knew it was his duty to qualify and get forty shares. Then comes the question, Within what time was he bound to qualify? I think that Mr. *Cozens-Hardy* is right in saying that he was entitled to a reasonable time within which to do so. What is a reasonable time within which to qualify for acting as a director? *Primâ facie* he ought to qualify before he acts. Sometimes the necessity for his doing so is excluded by the articles. Sometimes the articles say that he shall have time in which to qualify, but that in the meantime he shall act. Sometimes, as in this case, it cannot be said that the director must qualify before he acts. But suppose he is not bound to qualify before he acts, still, if a reasonable time for qualification has elapsed before he acts, must he not, when he does act, be taken to have acted in respect of some qualification? Here he did not act until a month after he was appointed. Why had he not then already had a reasonable time within which to qualify? Even if by November he had not had a reasonable time, I cannot see why he had not by January, when he again acted. It appears to me that a reasonable time to qualify had elapsed by the 24th of November, and certainly by the 18th of January, which is six weeks afterwards. Mr. *Cozens-Hardy* is quite right in saying that upon the authorities it was not incumbent on Lord *Inchiquin* to acquire shares direct from the company, and that he had a

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reasonable time in which to acquire his qualification shares, and the whole stress of his argument turned on the fact that ultimately Lord *Inchiquin* did get forty paid up shares which would have been sufficient to qualify him. Certainly, if he had acquired those within a reasonable time Mr. *Cozens-Hardy's* contention might have been correct, and there would have been nothing to prevent Lord *Inchiquin* from denying that he held the forty unpaid-up shares. But when you come to look at this case, it seems to me that the only proper inference to draw from the facts is this, that he was estopped, before he acquired his fully paid-up shares, from denying that he had the forty shares in respect of which he was actually registered.

The cases on this subject are extremely numerous, and, speaking broadly, they may be subdivided into cases where the director was on the register in respect of his qualification shares, and cases where he was not. Where a director is on the register it is for him to shew on what grounds he can get off after the winding-up has commenced. It is a much more easy matter to shew how he can escape liability before he has been put on the register. Having regard to the facts of this case it is impossible for Lord *Inchiquin* to get his name struck off in respect of the shares which he ought to have had as qualification shares, and in respect of which he must be presumed to have acted. I think, therefore, that, as a reasonable time in which to obtain his qualification shares had elapsed, the decision appealed from is right.

There is no difficulty on the authorities except on *Hewitt's Case* and *Brett's Case* (1), where the Court came to the conclusion that after a period of some three months a reasonable time had not elapsed. But the facts of that case were not like the facts in this. The articles were not like those here, and a reasonable time in one case may not be a reasonable time in another. I think that in the present case a reasonable time for acquiring the qualification shares had elapsed long before the 19th of January.

BOWEN, L.J.:—

I am of the same opinion. The question we have to decide is whether Lord *Inchiquin* was a member of the company in respect

(1) 25 Ch. D. 283.

of these qualification shares at or before the 19th of January, 1889. That seems to me to turn on the 23rd section of the *Companies Act*, 1862, which says that every person who shall agree to become a member of a company, and whose name shall be entered on the register of members shall be deemed to be a member of the company. Lord *Inchiquin* became a director and knew that by the articles of association that he was bound to qualify. The 75th article says that the qualification of a director shall be the holding of, at least, forty shares, and he agreed to take the necessary number of shares. The question seems to me to be one which must be decided upon the true construction of the articles. If there is no agreement that the qualifying shares shall be taken at a particular moment, then we must apply the rule of law that they must be taken within a reasonable time. What is a reasonable time seems to me to depend in each case on the particular circumstances of the case. There may be something in the articles to throw light upon it although it may not fix the exact time. On the other hand, there may be circumstances in the position of the company, and the proceedings at the board of directors, which throw light on the question as to the extent of time which is given for the completion of the contract to take shares. I do not like to lay down, and I do not think I can lay down a rule as to what should be taken to be a reasonable time for the completion of the contract in a case where you cannot find in the articles of association anything in the text exactly to decide the case which arises. I think here on every view of the facts that the time for the completion of Lord *Inchiquin's* contract to take shares had elapsed long before the 19th of January. He agreed to become a director on a certain day, and he attended a meeting or two, and was in the chair two or three times before the general meeting. I think that a reasonable time had elapsed for completing the contract with the company by virtue of which he became a director and was bound to qualify. If so, he had agreed at that date to become a director, and therefore in every respect the requirements of the Act of Parliament have been fulfilled and he must be taken to be a member of the company.

For myself, I should like to defer any consideration of the

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exact position of a person as a director who having undertaken to perform the part of director by taking qualifying shares, is on the register without knowing it—how far he is bound in such a case is a matter which I should like to leave open, as a difficult question of law, and one which would depend in most cases on the particular language of the articles.

It seems to me that assuming that Lord *Inchiquin* did not know that he was on the register, and assuming in his favour that that is the true meaning of his affidavit, still the facts here shew that at the critical moment he had agreed to become a member, and was on the register. He was therefore at that moment a member within the definition of those words of the section which have been referred to.

FRY, L.J.:—

I agree.

Solicitors for Lord *Inchiquin*: *Burn & Berridge.*
Solicitor for the liquidator: *Myers.*

W. W. K.

HARGREAVE *v.* FREEMAN.

CHITTY, J.

1891

May 8, 13.

[1891 H. 769.]

Trade-mark—Registration for entire Class—User for part of Class—Exclusive Title for entire Class—Trade Term—Infringement.

In 1879 the Plaintiff registered as his trade-mark for the whole of Class 45: *i.e.*, tobacco whether manufactured or unmanufactured," a device consisting of (*inter alia*) a shield with three crowns, and the word "*Mixture*" underneath; since registration the Plaintiff used this trade-mark solely on packages containing cut tobacco; subsequently the Plaintiff used the shield and three crowns without the word "*Mixture*," a trade term not appropriate to cigars, or boxes of cigars. The Defendants, cigar manufacturers, labelled their boxes with a device consisting of a shield and three crowns. On an application for an injunction to restrain this infringement:—

Held, that registration of a trade-mark for an entire class, followed by user on one description of goods only, did not give the exclusive right to the use of such trade-mark for all descriptions of goods in that class, and that under the circumstances the Plaintiff was not entitled to an injunction.

Edwards v. *Dennis* (1) discussed and applied.

MOTION.

On the 8th of October, 1879, the Plaintiffs, tobacco and cigar manufacturers at *Kingston-upon-Hull*, trading as *Richard Hargreave*, registered, under the *Trade Marks Registration Act*, 1875, a trade-mark, No. 21,247, for the whole of the goods in Class 45 in the first schedule to the rules made under the Act of 1875, that is "tobacco whether manufactured or unmanufactured." The trade-mark consisted of a device of three crowns within a shield, the words "*The Three Crowns*" printed above, and the word "*Mixture*" printed below the shield, and the words "*R. Hargreave*" on one side and "*Hull*" on the other side of the shield. Since the registration the Plaintiffs had used this trade-mark only on packages containing cut tobacco, and though they manufactured and sold cigars they had never used the whole of the trade-mark as registered with reference to cigars; what they did was, to affix to the cigar boxes labels with the device of the

(1) 30 Ch. D. 454.

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three crowns within the shield, the words "*Three Crowns*" over, and the word "*Habana*" below the shield together with an ornamental device of leaves and flowers, but they uniformly omitted from the cigar label parts of their registered trade-mark, *viz.*, the name "*Hargreave*," the place "*Hull*," and the word "*Mixture*."

The Defendants, wholesale cigar manufacturers, labelled their boxes with a device consisting of a shield, containing three crowns; they claimed no trade-mark, but gave no explanation how or why they came to use such a label.

The Plaintiffs now applied for an *interim* injunction to restrain the Defendants from infringing their registered trade-mark, and from selling or exposing for sale any boxes or parcels of cigars to which the said trade-mark or the words "*Three Crowns*" should be attached.

It was admitted that the term "*Mixture*" was one well known in the tobacco trade as signifying a mixture of cut tobacco, and that it was never used with reference to cigars.

Byrne, Q.C., and *T. Terrell*, for the Plaintiffs:—

The Defendants have taken the essential part of our registered trade-mark, the three crowns on a shield, and have applied it to the cigar boxes in which their goods are sold. That the Defendants' label is an infringement of ours, is not denied. Our registration for the whole of Class 45 is not to be limited by the use of the trade term "*Mixture*," neither ought we to be deprived of our rights, because we have omitted the term "*Mixture*" on the cigar boxes, for the reason that it is not appropriate to cigars, when we have used all the essentials of our trade-mark in connection with cigars. If we had never used this mark for cigars at all, possibly the case would have been different, and we should be bound by the decision in *Edwards* v. *Dennis* (1), but the present case is quite different from *Edwards* v. *Dennis*; in that case there were two rival trade-marks, both registered, and the articles sold by the Plaintiff and the Defendant, though both included in Class 5, were so totally different, that no one could be misled, or could mistake the Plaintiff's for the Defendants' goods; but here there are two rival manufacturers of similar

(1) 30 Ch. D. 454.

goods, and you have only to look at the two cigar boxes to see how easily the public might be deceived. [*Melachrino* v. *Melachrino* (1) and *In re Australian Wine Importers, Limited* (2) were referred to.]

Willis Bund, for the Defendants:—

"*Mixture*" is a well-known trade term, and the Plaintiffs' mark must, therefore, be confined to part only of the goods within Class 45, *viz.*, cut tobacco; besides, the Plaintiffs cannot by merely registering a trade-mark for an entire class, and yet only using it on one article of that class, claim the exclusive right to use it for every article in the class: *Edwards* v. *Dennis* (3). Then, again, the label they have used on cigar boxes is not the label as originally registered, and if the Plaintiffs wished to use it for cigars they should have re-registered. Defendants do not deal in cut tobacco, and so long as the Plaintiffs confined their trade-mark to cut tobacco, they did not interfere; if registration of the label for cigars had been applied for, the Defendants might have opposed. Under the present circumstances the Plaintiffs have no right to an injunction.

[Objection was also taken that the word "*Habana*," as used by the Plaintiffs, was a false trade description, and an offence under the *Merchandise Marks Act*, 1887; but as this defence was considered by his Lordship to be untenable, not having been raised or suggested by the evidence, and as no decision was given on the sections referred to, the argument and judgment on this point are omitted.]

Byrne, in reply.

May 13. CHITTY, J. (after briefly dealing with the Defendants' objection under the *Merchandise Marks Act*, 1887, and stating the facts, continued):—

Upon these facts it is argued for the Defendants, that although the Plaintiffs have registered their trade-mark for the whole of class 45, yet, by force of the terms of the trade-mark itself, it is confined to part only of the goods within the class, and,

(1) 4 Rep. Pat. Cas. 215. (2) 41 Ch. D. 278. (3) 30 Ch. D. 454.

CHITTY, J. 1891 HARGREAVE v. FREEMAN.

therefore, the registration must be restricted to such goods only. Now the term "*Mixture*," according to the evidence as it now stands, is not appropriate to cigars. It appears to me as a judge of fact that the term "*Mixture*," as applied to cigars would not operate as a recommendation, but rather as a deterrent to an intending purchaser. The Plaintiffs have never ventured to apply it to their cigars. It is an important, and indeed an essential part of their registered trade-mark, and the fact that although the Plaintiffs' registered trade-mark has been on the register for upwards of eleven years, they have not used it in connection with cigars, is strong evidence to shew that it is not applicable to cigars. In *Edwards* v. *Dennis* (1) the trade-mark was registered in respect of "unwrought and partly wrought metals used in manufacture." The original proprietor, and the plaintiff, the assignee of the goodwill of his business and trade-mark, used one kind of metal only and in one particular way, viz., iron for making plates; the defendant used another kind of metal in an entirely different way, being a maker of steel wire: and it was held by the Court of Appeal that the plaintiff's trade-mark ought to be confined to the description of goods on which he was using the mark (see also *In re Australian Wine Importers, Limited*) (2). *Edwards* v. *Dennis* differs in some respects from the case before me; in that case the plaintiff was the assignee of the goodwill of a business in which steel wire had not been made; and there was also an application (which succeeded) to amend the registration of the plaintiff's mark. But in that case Lord Justice *Cotton* stated his opinion that it was not the intention of the Act that a man registering a trade-mark for the entire class, and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in the class. The other Lords Justices appear to have been of the same opinion. There is, no doubt, a further distinction between the two cases, viz.: that the plaintiff there never made steel wire, whereas the Plaintiffs in the case before me have manufactured and sold cigars; but on the question of user there is no substantial difference.

(1) 30 Ch. D. 454. (2) 41 Ch. D. 278, 289.

In fact the Plaintiffs' case appears to resolve itself into this: they are or claim to be the proprietors of two trade-marks; one for cut tobacco or mixture, which they have registered, the other for cigars, which has not been registered, and registration of which has not been refused: they are really attempting to sue on the latter; which they cannot do by reason of the Act of Parliament.

The Plaintiffs' counsel in reply, urged that the Plaintiffs would be able to mend their case at the trial by giving evidence to shew that their registered trade-mark was applicable to cigars or in some other manner. I am unable to see how they can better their case: I hold out no encouragement to them to attempt it. One thing appears to me to be at all events plain: I ought not to grant an injunction on this motion; the fact that during the eleven years which have elapsed since their registration they have never applied their trade-mark as registered to cigars, is sufficient to disentitle them to an interlocutory injunction.

The order will be to refuse the motion, leaving the parties to bear their own costs. I can give the Plaintiffs no costs because they obtain no order on the only part of the motion which has been opened; I decline to give the Defendants any costs, because they have through their counsel made a charge of fraud which has failed, and in other respects they are destitute of merits.

Solicitors: *Oldman & Clabburn*, agents for *J. A. Jackson & Son, Kingston-upon-Hull; Tibbitts & Son*, agents for *J. & R. Harvey, Leicester.*

W. C. D.

CHITTY, J.
1891
June 9.

In re SCHWEDER'S ESTATE. OPPENHEIM *v.* SCHWEDER.

[1890 S. 1822.]

Will—Legacy to Wife—Insufficient Estate—Priority.

Where the personal estate is insufficient to pay all the legacies in full, a legacy to the testator's wife for her immediate requirements is liable to abatement, though directed to be paid within three months after the testator's decease.

In re Hardy (1) dissented from.

Blower v. *Morret* (2) followed.

Adjourned summons.

Julius Edward Schweder, by his will, dated November, 1889, after specific bequests of jewellery, furniture, ornaments, and plate to his wife, gave her "the sum of £600, to enable her to provide and furnish a suitable home and to defray any other expenses, such pecuniary legacy to be paid to my said wife within three calendar months after my decease, and to be for her own absolute use and benefit." The testator then directed that his said wife should, for the same period of three months, be permitted to reside, free of all rent and taxes, in testator's house; and he then made a specific bequest of certain leaseholds to his trustees, upon trust to pay the net income received therefrom to his said wife during widowhood. The testator gave numerous other legacies and annuities, and directed that some of the annuities should take priority over certain other annuities to his son and his son-in-law, and that, if necessary, the said last-mentioned annuities should abate proportionately, having regard to the foregoing priorities. On the death of the testator in the early part of the year 1890, his personal estate proved insufficient to pay in full all the legacies and annuities given by the will.

An originating summons was taken out by the executors and trustees against the widow and beneficiaries for the determination of various questions that had arisen under the will;

(1) 17 Ch. D. 798. (2) 2 Ves. Sen. 420.

but the only one argued and requiring a report was whether the legacy of £600 to the widow had priority over the other legacies.

Whitehorne, Q.C., and *Prior*, for the executors and trustees.

Byrne, Q.C., and *Ingle Joyce*, for the widow:—

This legacy is given with a bequest of specific articles of furniture and plate which must be handed over immediately, and with an express direction that it is to be paid within three months; the widow, therefore, has priority. *In re Hardy* (1) is directly in point and in our favour. True, *Blower* v. *Morret* (2) is in conflict with *In re Hardy*; but this being the later decision, and one in accordance with the intentions of the testator, we ask the Court to follow it.

Farwell, Q.C., and *Eady*, for some of the other beneficiaries:—

Blower v. *Morret* has never been overruled, and is binding on this Court. A direction as to the time of payment, such as within three months, or immediately after the testator's death, gives no priority: *Miller* v. *Huddlestone* (3). All the authorities were considered in *Roche* v. *Harding* (4).

[They were stopped.]

Corrie and *W. F. Webster* for other beneficiaries.

CHITTY, J.:—

It is well settled that near relationship to the testator does not of itself give a legatee any priority over other legatees. It may be said that a man is morally bound to provide for his widow and children, and, consequently, that the widow and children ought to have a priority over mere strangers, if the estate is insufficient to pay all legacies in full; but this natural inference or moral obligation is not sufficient of itself to give preference to a widow or child. It is also a well-established rule that a mere direction to pay a legacy immediately, or within one

(1) 17 Ch. D. 798.
(2) 2 Ves. Sen. 420.
(3) 3 Mac. & G. 513.
(4) 7 Ir. Ch. Rep. 338.

CHITTY, J. 1891 *In re* SCHWEDER'S ESTATE. OPPENHEIM *v.* SCHWEDER.

month or within three months after a testator's decease, is no evidence of any intention on the part of the testator to give priority to that particular legacy in case of a deficiency in the estate, because it is to be presumed that the testator intended all the legacies to be paid in full when he gave them. The testator in the case now before me has miscalculated, as often happens, the value of his estate; but at the time he made his will he certainly intended that there should be equality among his legatees, and it probably never occurred to him that his personal estate would not be sufficient to answer all his testamentary dispositions. [His Lordship, after reading the bequest, and referring to the fact that the testator had directed that some of the annuities were to take priority over others, continued:—]

Even on the words of this will, it is clear that the widow is not entitled to any priority, because there are instances where, when the testator intended certain annuities to have a priority, he has made express provisions by apt words for such priority.

The case of *In re Hardy* (1) has been cited, and pressed upon me as an authority directly in favour of the widow's claim to priority. In *In re Hardy*, the facts of which are very similar to the present case, Vice-Chancellor *Malins* dissented from *Blower* v. *Morret* (2), and declined to follow it. In my opinion, the Vice-Chancellor was bound by that decision, which was a decision of Lord Chancellor *Hardwicke* as long ago as 1752, and one that, until it came before the Vice-Chancellor, had never been questioned by any one. The case had got into the text-books; it is referred to in *Roper* on Legacies (3), and had up to 1881, at any rate, been generally accepted as an authority on this very point. The Vice-Chancellor, in his judgment, says (4): "In my opinion, *Blower* v. *Morret* is distinguishable in many respects, but if it is not, then I say I dissent from it and decline to follow it." In my opinion, *In re Hardy* was not distinguishable from *Blower* v. *Morret*, and, with all due respect to the learned Vice-Chancellor, he was bound by it. In *Blower* v. *Morret* there was a gift of a general legacy of £500 to the testator's wife, "to be paid her immediately after my decease out

(1) 17 Ch. D. 798.
(2) 2 Ves. Sen. 420.
(3) 4th Ed. p. 423.
(4) 17 Ch. D. 802.

of the first money belonging to me, that should be got in after my death"; and the Lord Chancellor decided, notwithstanding the words of the will as to immediate payment, that the legacy was liable to abatement, and that the widow had no priority. I think, therefore, that I am constrained by *Blower* v. *Morret* (1), and by the continued course of the authorities since that decision, to dissent from *In re Hardy* (2), as I do, and to hold in the result that the widow, in the case before me, has no priority over the other legatees in respect of this £600 legacy.

Solicitors: *Cowlard & Chowne; J. E. Fox & Co.; A. Schweder; Russell Cooke & Co.*

(1) 2 Ves. Sen. 420.

(2) 17 Ch. D. 798.

W. C. D.

NORTH, J.
1891
May 7.

In re JOHNSON.
MOORE *v.* JOHNSON.

[1891 J. 8.]

Infant—Settlement—Covenant to settle after-acquired Property—Property "in Expectancy"—18 & 19 *Vict. c.* 43, *s.* 1 [*Revised Ed. Statutes, vol. xii., p.* 468].

By virtue of sect. 1 of the *Infants' Settlement Act* of 1855, an infant is enabled, with the sanction of the Court, to enter into a covenant to settle after-acquired property, and such a covenant will apply to, and bring within the settlement, an interest acquired by the settlor under the will of a person who dies after the execution of the settlement, such an interest being property "in expectancy" within the meaning of sect. 1.

ORIGINATING SUMMONS by the trustees of a settlement, dated the 3rd of October, 1883, executed in contemplation of the marriage (afterwards solemnized) of *Charles F. Johnson* with *Helen Agnes Lawrence*, asking for the determination by the Court of the question, whether the wife (who was an infant aged eighteen, at the date of the settlement) was bound by a covenant contained in it for the settlement of her after-acquired property.

The settlement was made with the sanction of the Chancery Division of the High Court under the Act 18 & 19 Vict. c. 43.

By the deed certain property of the wife was assigned to trustees upon certain trusts, and the deed contained the following covenant:—

"And it is hereby agreed, and each of them the said *Helen Agnes Lawrence* and *Charles Frederick Johnson*, hereby covenants with the trustees hereinbefore named, that if, besides the trust funds hereinbefore assigned by the said *Helen Agnes Lawrence*, she now is, or if, at any time or times during the said intended coverture, she, or the said *Charles Frederick Johnson* in her right, shall become entitled, in any manner and for any estate or interest, to any real or personal property of the value of £100 or upwards, at one time and from one and the same source (except jewels, trinkets, ornaments, furniture, plate, china, glass, pictures, prints, books, and other chattels passing by delivery, which, and

also any property excepted from this covenant as being not of the value of £100, it is hereby agreed shall belong to the said *Helen Agnes Lawrence* for her separate use), then and in every such case the said *Charles Frederick Johnson* and *Helen Agnes Lawrence*, and all other necessary parties, shall, at the cost of the trust estate, as soon as may be, and to the satisfaction of the trustees or trustee, convey such real or personal property to the trustees or trustee," upon trusts for sale and conversion as therein mentioned, and to hold the proceeds upon the trusts therein declared.

The marriage was solemnized on the 24th of October, 1883. There were four children of the marriage. On the 2nd of July, 1888, the wife's mother died, having by her will bequeathed to the wife a legacy of £1900, and a share of residue amounting to about £2000. The question was, whether these sums were bound by the above covenant, or whether the wife was entitled to have them paid to her.

Ingpen, for the Plaintiffs.

P. S. Stokes, for the husband and wife :—

(1) The words of sect. 1 of the *Infants' Settlement Act* do not extend to property to which the infant had no title at the date of the settlement. "Property in expectancy" does not include property to which the infant had only a hope or expectation of succeeding; it means property in which the interest of the infant is a present one, expectant on the death of another person, *e.g.*, a policy of insurance on the life of a living person: *Vaizey* on Settlements (1); *Wolstenholme* on the *Conveyancing Acts* (2).

The object of inserting such a covenant is to bind the husband, and to protect the wife against his marital right.

[NORTH, J., referred to *In re Parsons* (3).]

In *Lord Dursley* v. *Fitzhardinge* (4), it was held that the next-of-kin of a lunatic could not sustain a bill to perpetuate testimony, because they had no interest whatever in his property. The Act extends only to property in which the infant has an actual interest; it must be "his property." A contingent

(1) Vol. i. p. 65.
(2) 5th Ed. p. 181.
(3) 45 Ch. D. 51.
(4) 6 Ves. 260.

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remainder cannot be settled. The expectancy of an heir is not capable of being made the subject of contract: *Carleton* v. *Leighton* (1).

[NORTH, J., referred to *Meek* v. *Kettlewell* (2).]

At the date of the settlement the wife had nothing but a chance or possibility of obtaining this property; she had no property in it.

(2.) The property is not bound by the covenant of the husband by reason of the *Married Women's Property Act*, 1882. *Hancock* v. *Hancock* (3) is distinguishable. There the settlement was executed before the Act came into operation, and sect. 19 applied. In the present case the settlement was made after the Act came into operation, and must be taken to have been executed with reference to the provisions of the Act. The covenant in the former case was entered into under the view of the law that property not given to the separate use of the wife would belong to the husband by his marital right; now, by virtue of the *Married Women's Property Act*, it belongs to the wife: *In re Queade's Trusts* (4); *In re Armstrong* (5).

Holland King, for the children of the marriage:—

The wife's interest in this property was at the date of the settlement property "in expectancy," and it is within the *Infants' Settlement Act*: *Flower* v. *Buller* (6); *In re Clarke* (7), which was approved by the House of Lords in *Tailby* v. *Official Receiver* (8). The Act puts an infant in the position of an adult for the purpose of making a settlement.

But for the *Married Women's Property Act*, this property would have vested in the husband by his marital right, and would have been bound by his covenant. Sect. 19 of that Act applies: *In re Whitaker* (9).

P. S. Stokes, in reply:—

In *Tailby* v. *Official Receiver*, Lord *Herschell* said (10), that in

(1) 3 Mer. 667, 671.
(2) 1 Ph. 342.
(3) 38 Ch. D. 78.
(4) 33 W. R. 816.
(5) 21 Q. B. D. 264, 270.
(6) 15 Ch. D. 665.
(7) 36 Ch. D. 348.
(8) 13 App. Cas. 523.
(9) 34 Ch. D. 227.
(10) 13 App. Cas. 530.

In re Clarke (1), the Court of Appeal left open the question whether a charge upon all the present and future personalty of the person giving it, "which would of course be without effect at law so far as regarded future acquired property, would be enforced in equity. I think your Lordships may also be content to put aside this point, which certainly does not arise in the case before you."

NORTH, J.:—

I think the property in question is bound by the covenant. In my opinion, it comes within the words of the *Infants' Settlement Act*. It must be remembered what the object of the Act was. It was intended to enable infants, with the sanction of the Court, to make valid settlements of property, which, in the case of females, would have passed to their husbands absolutely, unless a settlement in the usual form could be made by or on behalf of the infant before the marriage took place. In making such settlements, it is the invariable practice to insert covenants to bind the infant's after-acquired property. These covenants are frequently drawn so as to comprise both property which belongs to the infant at the date of the settlement, and also all other property which he or she may thereafter acquire. The words applying to existing property catch very little indeed as compared with the words applying to future property. Generally speaking, if a person who makes a settlement has existing property which it is not intended to settle, that property is expressly excluded from the settlement, and the settlement is confined to particular items. A covenant to settle other and after-acquired property is almost invariably worked out by its catching and sweeping into the settlement property which the settlor has not at the date of the settlement, but which he afterwards in some way acquires. The Act certainly does not in terms make any distinction between the one kind of property and the other in which an infant has an interest, and you would expect to find a provision enabling an infant to make such a settlement as, if he were not an infant, he would have made. When property is settled by the Court, a covenant to settle after-acquired property is usually inserted. The

(1) 36 Ch. D. 348.

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title of the Act is, "An Act to enable infants, with the approbation of the Court of Chancery, to make binding settlements of their real and personal estate on marriage." Then this object is worked out by sect. 1 thus: "It shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement, or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy," and every such settlement executed by the infant, with the approbation of the Court, is to be "as valid and effectual as if the person executing the same were of the full age of twenty-one years." These words are very large—"Any property, whether real or personal, and whether in possession, reversion, remainder, or expectancy."

It is said that property which the infant, if she had been twenty-one, could, beyond all question, have bound by her covenant for the valuable consideration of marriage, does not come within the scope of the settlement. The argument has been based especially on this, that the Act is dealing with property which the infant has, and that that must be property in which the infant has a present interest at the time at which the settlement is made, and the reason for so saying is that it is to be a settlement "of all or any part of his or her property." But that argument is not accurate. The Act is not addressed only to property of the infant. It applies also to property over which the infant "has any power of appointment"; and those words expressly cover that which is not the infant's own property. Therefore, the theory on which this argument is based, has not any foundation in the Act.

Still, it may be said that this property does not come within the terms of the Act, and that an infant's property cannot be bound unless it comes strictly within those terms. I think the reference in sect. 1 to property "in expectancy" is quite enough to include this property. In the passage which Mr. Justice *Kay*, in *In re Parsons* (1), quoted from *Watkins* on Conveyancing (2), the word "expectancy" is expressly applied to such an interest

(1) 45 Ch. D. 57. (2) 8th Ed. p. 219.

as that which is now in question—viz., "the hope of inheritance entertained by the heir." Bearing in mind the object and scope of the Act; bearing in mind that the argument in favour of the wife cannot be supported on the ground that it is only the property of an infant which the Act enables to be settled; bearing in mind also the invariable practice of inserting covenants of this kind in settlements made by infants, and the large amount of property which has been included in settlements so framed since this Act was passed; I must decline to say that this property is not comprised in the settlement, or that the settlement does not affect it.

As to the other point which has been raised on the *Married Women's Property Act*, I can also see a difficulty in the lady's way, by reason of sect. 19 referring to settlements "to be made," as well as to settlements made before the Act, but I do not think it necessary to express any concluded opinion on this point, because my decision on the first point completely disposes of the case.

Solicitors for all parties: *Fooks, Chadwick, Arnold, & Chadwick.*

W. L. C.

In re YATES.
BOSTOCK *v.* D'EYNCOURT.

[1890 Y. 902.]

Will—Construction—Gift to Children and issue of deceased Children—"Share and Share alike"—Joint Tenancy or Tenancy in Common.

A testator devised real estate to trustees in fee, upon certain trusts during the lives of his sons and daughters and the survivors and survivor of them. And from and after the death of the survivor of his sons and daughters, or during the lives or life of all or any with their concurrence, upon trust to sell the property, and to stand possessed of the proceeds "upon trust for all and every my said sons and daughters who shall be then living, and the issue of any then dead (such issue standing *in loco parentis*) share and share alike":—

Held, that the sons and daughters and the issue of a deceased son or daughter (as representing their deceased parent) took as tenants in

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common, but that, there not being words of severance among the issue of a deceased son or daughter such issue took *inter se* as joint tenants.

Shepherdson v. *Dale* (1) disapproved.

SUMMONS by two of the trustees of the will of *John Yates*, deceased, for the determination of a question arising upon the construction of his will.

By his will, dated the 14th of October, 1826, the testator devised some real estate at *Toxteth Park, Liverpool*, to his trustees in fee, upon certain trusts during the lives of his sons and daughters and the survivors and survivor of them. And from and after the decease of the survivor of his sons and daughters, or during the lives or life of all or any with their concurrence, upon trust to sell the said hereditaments and to stand possessed of the proceeds of sale "upon trust for all and every my said sons and daughters who shall be then living and the issue of any then dead (such issue standing *in loco parentis*) share and share alike."

The testator died on the 10th of November, 1826. He left six children surviving him, viz., *J. B. Yates*, who died on the 12th of December, 1856; *J. A. Yates*, who died on the 1st of November, 1863; *R. F. Yates*, who died on the 30th of November, 1856; *James Yates*, who died on the 7th of May, 1871; *Anna Maria Yates*, who died on the 3rd of April, 1866; and *Jane Ellen Yates*, who died on the 22nd of December, 1877. The property was not sold till October, 1890, and the question then arose how the purchase-money ought to be divided. Of the testator's children only *J. B. Yates* and *J. A. Yates* had issue.

J. B. Yates had six children, five of whom were living at the date of the sale. The sixth, *Anna Maria*, the wife of *R. N. Phillips*, died in April, 1850. *J. A. Yates* had four children, three of whom were living at the date of the sale. The fourth, *Eliza Melesina Yates*, died in November, 1888, a spinster.

The Defendants to the summons were, *L. C. Tennyson D'Eyncourt*, the third trustee of the testator's will, whose wife was a daughter of *J. A. Yates*; Lady *Musgrave*, the widow of Sir *R. Musgrave*, another of the daughters of *J. A. Yates*; the executors of

(1) 12 Jur. (N.S.) 156.

R. N. Phillips; and the surviving trustee of the settlement made on the marriage of Mr. and Mrs. *Phillips*.

Leonard Field, for the Plaintiffs, stated the case.

Cozens-Hardy, Q.C., and *Davenport*, for the first Defendant:—

The issue of deceased sons or daughters of the testator are to stand in *loco parentis*, and the issue take *inter se* as tenants in common. The testator's primary intention was to postpone the sale of the property until the death of the survivor of his sons and daughters, though with their consent the sale might take place earlier. The words "share and share alike" apply to the issue as well as to their parents: *Penny* v. *Clarke* (1); *Bridge* v. *Yates* (2); *Hodges* v. *Grant* (3).

G. Williamson, for the executors of *R. N. Phillips*, in the same interest.

Everitt, Q.C., and *Hume*, for the trustee of the settlement of Mr. and Mrs. *Phillips*:—

The class to take is to be ascertained at the time of the sale, which would be after the deaths of the sons and daughters of the testator. The members of the class must take as tenants in common.

Napier Higgins, Q.C., and *Ingpen*, for Lady *Musgrave*:—

The issue of the deceased sons and daughters take *inter se* as joint tenants. The words "share and share alike" apply only to the sons and daughters *inter se*, there not being double words of severance: *In re Sophia Smith* (4); *Lyon* v. *Coward* (5); *Heasman* v. *Pearse* (6). In *Hodges* v. *Grant* there were double words of severance.

Cozens-Hardy, in reply:—

In *Shepherdson* v. *Dale* (7) there were not double words of

(1) 1 D. F. & J. 425.
(2) 12 Sim. 645.
(3) Law Rep. 4 Eq. 140.
(4) 58 L. J. (Ch.) 661.
(5) 15 Sim. 287.
(6) Law Rep. 7 Ch. 275.
(7) 12 Jur. (N.S.) 156.

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severance, and it was held that children, as well as their parents, took as tenants in common. That case is precisely in point.

NORTH, J. :—

I cannot agree with Mr. *Cozens-Hardy's* view of the proper construction of this will. The first direction is this: "And from and after the decease of the survivor of my own sons and daughters, or during the lives or life of all or any with their concurrence, upon trust that the trustees or trustee for the time being of this my will, do and shall sell the property." It is said that the testator's primary intention was that the trustees should sell after the death of the survivor of his sons and daughters, but that there was a secondary intention that they should sell during the lifetime of the sons and daughters. I should have thought that a primary intention would apply (if at all) to that which was to take place first, and that a secondary intention would apply to that which was to take place afterwards. But I cannot draw any distinction between the two. There is to be a sale after the death of the survivor of the sons and daughters, and the sale may be made earlier if the sons and daughters concur, but not unless they do. Then we come to the words of division of the proceeds of sale, and whatever may be gathered as to the testator's primary intention as regards the trust for sale, the thing now primarily contemplated by him is that the proceeds of sale are to be divided while there are sons and daughters still living to take. The words are "shall stand possessed of and interested in the moneys arising from such sale or sales, upon trust for all and every my said sons and daughters who shall be then living, and the issue of any then dead." It is clear that the testator thought there would be some sons and daughters then living, but he contemplated also the possibility that some or one of them might be dead in whose place the issue were to stand. I do not for a moment deny that as a matter of construction the clause hits the case of all the sons and daughters being dead before the time for division should arrive, but what the testator really had in his mind was that some of them would be still living. What then is the class among whom the money is to be divided? It is "all and every my said sons and

daughters who shall be then living, and the issue of any then dead." Looking at those words alone, we have a class consisting of sons and daughters then living, and the issue of any then dead, and they will take *per capita* as tenants in common or joint tenants, as the case may be. Up to that point there are no words of severance, and I apprehend they would take as joint tenants. But then come the words "such issue standing in *loco parentis*." Therefore, there is not a class of sons and daughters, and issue of deceased sons and daughters, who are all to stand in the same position, but the class is to consist of sons and daughters, and the issue of deceased sons and daughters who are to stand in the place of their parents. "In the place of a parent" means in the place in which the parent would have stood, if he had been living. Therefore, we have a class consisting of sons and daughters then living, and the family (so to speak) of a deceased son or daughter, which family is to stand where the parent would have stood, if he or she had been alive, and members of that class would, if there were no other words, take as joint tenants.

But then come the words, "share and share alike." What do they mean? Of course, they create a tenancy in common, instead of a joint tenancy. But in whom? In the class described as to which there would have been a joint tenancy, but for the fact that those words follow. It is impossible that there can be a joint tenancy between sons and daughters and the issue of a deceased son or daughter, who only take among them their parent's share. The persons who are to take as joint tenants must take equal shares. Then the words "share and share alike" indicate clearly that the persons who would have taken as joint tenants—that is, the surviving sons and daughters and the family, which is an individual, as it were, for this purpose, are to take share and share alike. Therefore, the family of the deceased child takes one share. How are they to take it? There are no words in the will addressed to that particular case. Mr. *Cozens-Hardy* has referred to *Shepherdson* v. *Dale* (1), and if that had been the only authority to be found, it being very like the present case, I should probably have followed it without any hesitation.

(1) 12 Jur. (N.S.) 156.

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But there are other cases in the books in which this matter has been considered, and the Court has held, time after time, that when words of distribution occur only once, there being two classes to take, those words apply to the first class only (that is, here the sons and daughters); and not to the second class, in this case, the issue who are to take the share which a deceased son or daughter would have taken if alive. Mr. *Ingpen* has cited two cases, and there are a great many more to be found. *Penny* v. *Clarke* (1) was one. Lord Justice *Knight Bruce* said nothing contrary to this view. Lord Justice *Turner* decided in favour of it, as Vice-Chancellor *Wood* had done. The later case of *Heasman* v. *Pearse* (2) is exactly in point, and is to the same effect.

The cases which have been relied upon to the contrary are quite distinguishable. In both of them, *In re Sophia Smith* (3), and *Hodges* v. *Grant* (4), the words of severance were repeated twice over. Mr. *Hardy* asks—What difference can that make? Well, the Courts have drawn a distinction where words of division occur twice over, by giving a meaning to each of the two sets of words by referring one set to one class and the other set to the other class; and that being so I cannot say that the repetition goes for nothing. I think that those cases are distinguishable on this ground, and there being here no words of division between the issue of a deceased child, those issue must take *inter se* as joint tenants.

Solicitors: *Field, Roscoe & Co.; Williamson, Hill & Co.*; *G. L. P. Eyre & Co.; Hopgood & Dowson.*

(1) 1 D. F. & J. 425.
(2) Law Rep. 7 Ch. 275.
(3) 58 L. J. (Ch.) 661.
(4) Law Rep. 4 Eq. 140.

W. L. C.

Considered. *In re* SCHAR, DECD. [1951] 1 Ch. 280

In re WILKS. CHILD *v.* BULMER.

STIRLING, J.

1891

April 17; *May* 24.

[1879 W. 188.]

Joint Tenancy—Severance.

In order to amount to a severance of a joint tenancy, the act of a joint tenant must be such as to preclude him from claiming by survivorship any interest in the subject-matter of the joint tenancy.

A fund had been carried over in an administration action to the credit of the three infant Plaintiffs "as joint tenants." On the 19th of March, 1890, *W.*, the eldest of the Plaintiffs, attained twenty-one, and became entitled to have one-third of the fund in Court paid out to him. On the 20th of March, solicitors were instructed on behalf of *W.* to take proceedings to get his share paid out, and on the 21st of March they obtained leave to add to a pending summons an application for payment out to *W.* of his one-third share. The amended summons was returnable on the 28th of March. On that day the parties attended, and the evidence on the part of *W.* was complete, but owing to pressure of business the summons was not reached, and it was adjourned to the 22nd of April.

On the 2nd of April *W.* died:—

Held, that nothing had been done by or on behalf of *W.* which amounted to a severance of the joint tenancy.

Semble, it would have been otherwise if an order had been made.

Adjourned summons.

In this action a fund had been carried to the separate account of the "infant Plaintiffs as joint tenants." *Wilks Child*, the eldest of these infant Plaintiffs, who were three in number, attained twenty-one on the 19th of March, 1890, and thereupon became entitled to have one-third of the fund then standing to the credit of the account paid out to him. On the 20th of March, *Wilks Child* requested his father to instruct solicitors to take the necessary proceedings to get the fund paid out of Court. The father instructed a firm of country solicitors, and they in turn instructed their agents in *London* to procure payment out of Court without delay.

At the time a summons was pending for payment out of Court of a fund standing to another separate account in the action, in which these same *London* agents appeared for the applicant, and on the 21st of March the agents obtained leave to amend the

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pending summons by including in it an application for the payment to *Wilks Child* of one-third of the fund in question. Leave was accordingly given and the amended summons was made returnable on the 28th of March. On that day the parties attended; the evidence in support of the titles of the applicants was complete, but through pressure of business the summons was not reached and was adjourned to the 22nd of April. On the 2nd of April, *Wilks Child* died. An order was subsequently made on the summons, but it did not deal with the fund now in question. The father of *Wilks Child* took out representation to him, and sought by the present summons payment to himself of one-third of the fund. The other Plaintiffs interested were infants, and the question for the determination of the Court was, whether *Wilks Child*, in his lifetime, did that which amounted to a severance of the joint tenancy subsisting between himself and the infant co-Plaintiffs.

Hastings, Q.C., and *B. Eyre*, for the father in support of the summons:—

In this case, *Wilks Child*, one of three co-owners, did all that he could to sever the joint tenancy. He came to the Court and asked for payment out of his share. It is true that by the act of the Court the application was adjourned; but it was a mere accident that the Court did not make the order on the 28th of March. "*Actus curiæ nemini facit injuriam*" is a maxim of law. Delay is the act of the Court, therefore the parties should not suffer by it: *Smith's* Leading Cases (1), and cases there cited, the last of which is *Turner* v. *London and South Western Railway Company* (2). The case should be treated as if the order had been made on the 28th of March.

[STIRLING, J., referred to *Partriche* v. *Powlet* (3); *Perkins* v. *Baynton* (4), and *Moyse* v. *Gyles* (5).]

If the act of the joint owner is such that it is inconsistent with the continuance of the joint tenancy, that is enough. A joint tenancy may be severed by conduct: *Williams* v. *Hensman* (6);

(1) 9th Ed., Vol. i. p. 384.
(2) Law Rep. 17 Eq. 561.
(3) 2 Atk. 54.
(4) 1 Bro. C. C. 118.
(5) 2 Vern. 385.
(6) 1 J. & H. 546, 558.

a joint tenancy in income is severed as to each instalment as it becomes payable, without actual payment: *Walmsley* v. *Foxhall* (1); a letter engaging to deal with a fund in the future in a particular way, has been held to sever a joint tenancy: *Gould* v. *Kemp* (2).

[STIRLING, J. In *Gould* v. *Kemp* the letter amounted to an agreement to sever.]

If *Wilks Child's* application had been heard it would have been a mere matter of course for the Court to make the order. The application was not a secret act; it was made in the presence of the other parties, and the Court should do its utmost to help the severance of the joint tenancy, so that the adjournment—the act of the Court—should not work injury to the representatives of the joint tenant.

[They also referred to *Caldwell* v. *Fellowes* (3).]

Method, for the surviving infant joint tenants:—

A joint tenancy can only be severed (1.) by an actual alienation by one of the joint owners, or a disposition amounting at law or in equity to an assignment of one of such owners, or (2.) by a contract to sever between joint owners. A mere application to the Court by one of several joint owners is nothing more than a declaration that he wishes a severance. The application made by *Wilks Child* in this case could have been at any time withdrawn by him, and nothing was in fact done upon it which could have any effect upon the joint tenancy. An order was made upon the other part of the summons, but *Wilks Child's* application stood over.

[He referred to *Moyse* v. *Gyles* (4); *Wallace* v. *Auldjo* (5).]

Hastings, in reply.

May 24. STIRLING, J.:—

A joint tenancy may unquestionably be severed either (1.) by a disposition made by one of the joint owners amounting at law

(1) 40 L. J. (Ch.) 28.
(2) 2 My. & K. 304.
(3) Law Rep. 9 Eq. 410.
(4) 2 Vern. 385.
(5) 32 L. J. (Ch.) 748.

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or in equity to an assignment of the share of that owner; or (2.) by mutual agreement between the joint owners. It is not pretended that *Wilks Child* made any assignment of his share; and agreement, whether express or implied, is out of the question, two of the joint owners having been at the time of his death and in fact still being infants.

It is contended on behalf of the infants that there is no other way in which a joint tenancy can be severed. Without going so far, I think that if the act of a joint tenant amounts to a severance it must be such as to preclude him from claiming by survivorship any interest in the subject-matter of the joint tenancy.

In the present case all that was done by or on behalf of *Wilks Child* was to take out and prosecute a summons for payment of one-third of the fund to himself; but no order was made. Until an order was made on that summons *Wilks Child* was completely master of the proceedings; he was at liberty, if he thought fit, to discontinue them at any moment, paying of course the costs incurred by the other parties. If then one of the infant co-Plaintiffs had died after the 28th of March, and *Wilks Child* had been still surviving, I am unable to see why he might not have obtained leave to amend the pending summons by asking for payment to himself of a moiety of the fund instead of one-third; or if for any reason such leave was refused, why he should not have abandoned the pending summons on payment of costs, and issued a fresh summons claiming half the fund. If an order had been made on the summons the position would not have been the same; *Wilks Child* would no longer have been at liberty as of right either to abandon the summons, or to amend it. It is not necessary to decide the point, but he would then appear to me to have carried his acts to such a point as to preclude him from claiming any further right by survivorship.

There is very little authority on the question, but such as it is, it appears to me to be somewhat in favour of the view which I have taken. In *Partriche* v. *Powlet* (1) Lord *Hardwicke* says: "If no agreement, then there must be an actual alienation to make it amount to a severance; the declaration of one of the

(1) 2 Atk. 54.

parties that it should be severed, is not sufficient, unless it amounts to an actual agreement."

In *Perkins* v. *Baynton* (1) Lord *Thurlow* says: "*William Baynton*, in the life of *Stukely Baynton*, brought his bill for the moiety of this money. It is contended that severed the joint tenancy. I do not know that a demand will sever a joint tenancy." This is *dictum* only, for it was held that the gift of the fund there in question created a tenancy in common and not a joint tenancy. In *Williams* v. *Hensman* (2) Lord *Hatherley* (then Vice-Chancellor) says: "A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund—losing, of course, at the same time, his own right of survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find, in this class of cases, a course of dealing by which the shares of all the parties to the contest have been affected." The Vice-Chancellor referred to the case of *Wilson* v. *Bell* (3). In that case *Lefroy*, B., says (4): "It was not argued that this was not in its origin a joint tenancy; but it was contended, and upon undoubted authority, that joint tenants may so act as in Equity to sever the joint tenancy; that if the acts and dealings of the parties in respect to the joint property indicate an intention to treat it as property held in common and not jointly, the Court will, from those acts and dealings, infer an agreement to sever the joint tenancy; and

(1) 1 Bro. C. C. 118.
(2) 1 J. & H. 546, 557.
(3) 5 Ir. Eq. Rep. 501.
(4) Ibid. 507.

STIRLING, J. 1891 *In re* WILKS. CHILD *v.* BULMER.

that it is settled, that an agreement to sever will in Equity amount to a severance; and as this is personal property, there is no doubt that even a parol agreement would be sufficient for that purpose." The third class of cases mentioned by the Vice-Chancellor, therefore, appears to include those in which there is no express agreement to sever, but such agreement may be inferred from the conduct and dealings of all parties. In the present case, agreement of any kind is excluded by reason of the infancy of two of the joint tenants.

It was further contended by the applicant that the right of *Wilks Child* ought not to be defeated by the act of the Court, and that the same order ought to be now made as would have been made on the 28th of March, 1891, if the summons had been reached; and in support of this the decision of Vice-Chancellor *Hall* in *Turner* v. *London and South Western Railway Company* (1) was cited. There it was held that where a plaintiff died after hearing but before judgment the Court had jurisdiction to date the judgment as of the date of the hearing. Here, however, there was no hearing: so that the decision does not exactly cover the point. Further, as I have said, an order has been made on the summons pending on the 28th of March, but it did not extend to the fund in question; the present application is made on a summons subsequently taken out. Lastly, if I am right in the view which I have expressed above, nothing had happened on the 2nd of April to prevent the surviving Plaintiffs from asserting title to the fund by survivorship.

In my opinion the application fails and must be dismissed.

Solicitors: *Jaques & Co.; The Official Solicitor.*

(1) Law Rep. 17 Eq. 561.

W. W. K.

In re SMITH'S SETTLED ESTATES.

KEKEWICH, J.

[1891. S. 644]

1891

May 2, 8, 9.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 4, 21, *clause x*, 46, *sub-s.* 6, 47, 55, *sub-s.* 3—*Costs of Attempted Sale—Payment out of Capital Money —Charge on Settled Land.*

Where a tenant for life, acting honestly and with due diligence in the exercise of the powers conferred on him by the *Settled Land Act*, 1882, attempts to sell the settled land, but the sale is unsuccessful, the costs or expenses properly incurred by him in respect of such attempted sale are payable out of capital money under sect. 21, clause x., of the Act.

In re Llewellin (1) followed.

Upon an application by the tenant for life in such a case in reference to costs or expenses so incurred, the Court, under sects. 46, sub-sect. 6, 47 and 55, sub-sect. 3, of the Act, has power to order that such costs or expenses be paid out of the property subject to the settlement, and raised by a charge on the settled land.

THIS was an adjourned summons, raising questions as to the payment of expenses of and incidental to an attempted sale by auction, under the powers of the *Settled Land Acts*, by the tenant for life of two settled estates known as the *Shortgrove* estate and the *Clanver End Farm* estate.

By a settlement, dated the 14th of August, 1879, the *Shortgrove* estate was limited to uses or upon trusts, under which *Joseph C. T. Smith* became, on the death of his father, *William Charles Smith*, which took place on the 6th of June, 1883, beneficially entitled in possession as tenant for life, with remainders over in favour of other persons in succession.

William Charles Smith, by his will dated the 18th of April, 1879, bequeathed certain sums of stock to trustees upon trust to invest the same in the purchase of hereditaments convenient to be held with the hereditaments subject to the uses or trusts of his will, or with any similarly settled hereditaments, and directed that the purchased hereditaments should be settled to the use of *Joseph C. T. Smith* for his life, and after his death to uses substantially similar to those declared by the settlement of 1879 (except that certain uses limited by the settlement, after the

(1) 37 Ch. D. 317.

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death of *Joseph C. T. Smith*, for the purpose of certain family charges, were omitted from the will, and that the will contained a proviso substituting in certain contingencies estates for life, with remainder to sons successively in tail, for estates in tail male); and the testator empowered his trustees, upon the request of any person thereby made tenant for life, to apply all or any of the principal trust moneys which might from time to time be in their hands, under or by virtue of the trusts thereinbefore contained, in or towards paying off or discharging any mortgage or other charge or incumbrance for the time being affecting any of the hereditaments subject to the subsisting uses or trusts of the will, or any similarly settled hereditaments. The will contained a definition of the expression "similarly settled," such definition having apparently been framed with a view to, or in contemplation of, the settlement of 1879.

By a codicil to his will, dated the 11th of November, 1881, the testator, having then lately purchased the *Clanver End Farm* estate (subject to a subsisting mortgage thereon), devised that estate to the uses to which the trustees of his will were directed to settle the hereditaments to be purchased as therein mentioned.

Joseph C. T. Smith mortgaged his life estate by three several mortgages to different mortgagees for sums amounting to £6500.

On the 15th of December, 1888, Mr. Justice *Kay*, on the application of *Joseph C. T. Smith*, made an order empowering him to sell the principal mansion-house, with the demesnes thereof and other lands usually occupied therewith, forming part of the *Shortgrove* estate, in such manner and subject to such conditions as he and his mortgagees should think fit.

In exercise of the powers conferred by the *Settled Land Act*, 1882, *Joseph C. T. Smith* caused the whole of the *Shortgrove* estate and *Clanver End Farm* estate to be put up for sale by auction in lots at the *Mart, Tokenhouse Yard*, on the 25th of June, 1889, by Messrs. *Debenham, Tewson, Farmer & Co.* The reserve prices fixed (amounting in the aggregate to £97,080) were not reached, except in the case of two lots, part of the *Shortgrove* estate, which were sold for sums amounting together to £325.

The costs of the attempted sale amounted to £1171 8*s.* 7*d.*, of which £646 12*s.* 10*d.* represented auctioneer's charges, and £524 15*s.* 9*d.* solicitor's charges.

The trustees of the settlement of 1879 had the sum of £520 14*s.* 5*d.* 2¾ per cent. Consols standing in their names, representing capital money arising under the *Settled Land Act*, 1882, or applicable as such.

The trustees of the will and codicil of *W. C. Smith* were possessed of two sums of £928 17*s.* 2*d.* stock of the *Bank of England* and £4545 8*s.* 6*d.* 2¾ per cent. Consols, which represented principal moneys come to their hands under or by virtue of the trusts contained in the will.

By the present summons, which was served on the trustees of the settlement and of the will (who were also respectively trustees for the purposes of the *Settled Land Acts*), the mortgagees of the life estate and infant remaindermen, *Joseph C. T. Smith* asked (1.) that it might be declared that his costs, charges, and expenses, amounting to £1171 8*s.* 7*d.*, of the attempted sale, and the costs, charges, and expenses of, and incidental to, his obtaining the leave of the Court to sell the principal mansion-house, demesnes, and lands occupied therewith, were costs, charges, and expenses of or incidental to the exercise of the powers of sale conferred by the *Settled Land Act*, 1882; (2.) that it might be declared that the said costs, charges, and expenses, so far as they had been incurred in relation to the *Shortgrove* estate, were payable out of, or a charge upon, that estate or the unsold part thereof; and (3.) that it might be declared that the costs, charges, and expenses, and the costs of all parties of the present application, might be raised and paid out of the £928 17*s.* 2*d.* Bank Stock and £4545 8*s.* 6*d.* Consols, or either of these sums, or out of any moneys from time to time in the hands of the trustees of the will and codicil (1).

(1) The *Settled Land Act*, 1882, by sect. 21, enacts: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) . . . .

"(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act."

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Upon the hearing of the application, two questions only were argued, namely, first, whether the costs of the attempted sale were properly payable out of capital money under sect. 21 of the *Settled Land Act*, 1882; and, secondly, whether such costs were a charge on the *Shortgrove* estate; it being conceded that, upon the present occasion, the Court could not be asked to determine whether or not the *Shortgrove* estate and *Clanver End Farm* estate were "similarly settled" within the meaning of the will, but that the trustees of the will and codicil must satisfy themselves on that point.

The two questions were separately argued.

Warmington, Q.C., and *Brinton*, for the Applicant, the tenant for life:—

It is submitted that the costs of this attempted sale are properly payable out of "capital money," under the *Settled Land Act*, 1882. It would be a great hardship if a tenant for life,

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By sect. 46, sub-sect. 6: "The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement."

By sect. 47: "Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit."

By sect. 55, sub-sect. 3: "Where any provision in this Act refers to sale, purchase, . . . or other dealing, or to any power, . . . contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, . . . dealings, powers, consents, . . . contracts, expenses, acts, and transactions under this Act."

exercising his powers under sect. 3 of that Act, were called upon to guarantee an effective sale, by being made to pay the costs out of his own pocket if the sale proved abortive. Under sect. 4, there are various matters in respect of which costs must be incurred, if the power of the tenant for life is reasonably exercised. The terms of sect. 21, clause x., are wide enough to include these costs. Under sect. 53, a tenant for life is to be deemed to be in the position, and to have the duties and liabilities, of a trustee, and this places him in a situation of great responsibility with reference to a sale: *In re Llewellin* (1); *In re Lord Stamford's Settled Estates* (2). He ought, therefore, to be entitled to a corresponding indemnity for his costs out of capital, if he reasonably does his duty with a due regard to the interests of those who are to come after him. *In re Llewellin* is an express authority that a tenant for life is entitled to costs, charges, and expenses, incurred "casually or incidentally" in the course of the exercise of his powers, including the costs of a sale properly and rightly attempted.

Butcher, for the trustees of the settlement and will.

Hood, for the infant remaindermen:—

As the income of the tenant for life is small, and the infant remaindermen are living with him, it is doubtful whether it is to their interest to oppose the application. And if the tenant for life is in the position of a trustee it is difficult to see any principle upon which the application can be opposed. It is right, however, to refer to *Sebright* v. *Thornton* (3).

Austen-Cartmell, for the mortgagees of the life estate, supported the application.

May 8. KEKEWICH, J.:—

The question which I have to consider in this case may be thus stated. A tenant for life, honestly and with due diligence attempts to sell the whole or part of the land comprised

(1) 37 Ch. D. 317, 327. (2) 43 Ch. D. 84, 95.
(3) W. N. (1885) 176.

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in the settlement under which he holds, and that attempt is wholly or partially unsuccessful. Is he at liberty to charge the costs incurred in the attempted sale against capital moneys under the *Settled Land Act*? So far as the sale is successful he is, no doubt, entitled to do so. If, for instance, land has been put up in six lots and some of them have been sold, the tenant for life is entitled to apportion part of the costs incurred, it may be one-sixth or a smaller proportion, having regard to the value of the property sold; but is he entitled to charge the costs incurred in having put up for sale that part which is not sold? If the sale is wholly unsuccessful, is he entitled to charge against capital the entire costs of the sale which has had no result? The question came before Mr. Justice *Stirling* in *In re Llewellin* (1), not in precisely the same form in which it comes before me, but in substance in the same way. The sections of the Act which were discussed before me were discussed on that occasion; the case was fully argued, and Mr. Justice *Stirling* came to the decision, clearly expressed, that a tenant for life is, for reasons stated by him, entitled to charge costs in such a case. I am of course at liberty to reconsider that decision, having regard to the fact that the decision was only in 1887, under an Act of recent date, and that so far as my own knowledge and the industry of counsel are concerned there is no other reported case in point; but I doubt not that many persons, tenants for life, and solicitors who have advised tenants for life, have acted on that decision, and therefore if I were to reconsider it I should do so with reluctance. I have thought it my duty to give my best attention to it, and I desire not only to follow it but to express my entire concurrence with it. I will not say more upon it. I think it best to adopt the language of Mr. Justice *Stirling*, and not to express in my own language the same result; for if I were to do so it might lead to confusion and give rise in some minds to distinctions which do not exist and were never intended to be drawn. Therefore, I follow the decision of Mr. Justice *Stirling*, but I think it right to say not only that I regard it as a binding authority, but that I adopt it as my own. I think the order on this summons can only authorize the payment of costs properly

(1) 37 Ch. D. 317.

incurred; and though I have no doubt that the costs mentioned in the affidavit of the tenant for life have been properly incurred, and looking at the several affidavits that have been filed, that the purposes are proper, I think the sum to be charged must be ascertained by the proper officer.

May 9. *Warmington*, Q.C., and *Brinton*, for the tenant for life:—

As the capital money in the hands of the trustees of the settlement applicable in payment of these costs is insufficient, it would be convenient that the trustees of the will should have recourse to their power of applying the funds in their hands in paying off or discharging "any mortgage charge or incumbrance" affecting the property comprised in the settlement; and the Court is therefore asked to declare that the costs are a charge on that property. Such a declaration is necessary for the protection of the trustees. In *In re Llewellin* (1) Mr. Justice *Stirling* treated sect. 46, sub-sect. 6, as extending further than the mere costs of the application.

[They referred also to *In re Mundy's Settled Estates* (2).]

Butcher, for the trustees:—

It could not have been the intention of the Legislature that the tenant for life should be deprived of his right to costs simply because there was no capital money in the hands of the trustees of the settlement, or that in order to obtain payment, he should be driven to the inconvenient expensive and roundabout course of making capital money by exercising his powers under the Act. Sect. 46, sub-sect. 6, is not confined to "costs of the application," but extends to "costs, charges, or expenses of all or any of the parties to any application," and read in connection with sect. 21, clause x, must extend to all costs arising out of or in connection with the application.

[KEKEWICH, J.:—It could hardly extend to costs incurred many years previously.]

Sect. 55, sub-sect. 3, supplies the necessary limitation, by

(1) 37 Ch. D. 317, 326. (2) [1891] 1 Ch. 399.

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confining the word expenses to expenses under the Act; and in *In re Llewellin* (1) Mr. Justice *Stirling* applied that limitation to the costs there in question.

[KEKEWICH, J.:—If the tenant for life had been selling with the sanction of the Court, sect. 46, sub-sect. 6, might have been sufficient for the present purpose; but here, though the order of the Court was obtained as to a part, the tenant for life attempted to sell the whole. My difficulty is to find in the Act a jurisdiction conferred on me to make these costs a charge on the settled land.]

If they are costs to be paid out of capital money, then it is submitted that sect. 46 makes them payable out of the property subject to the settlement. Sect. 21 merely enumerates the various modes in which capital money may be applied, and does not limit the general power conferred by sect. 46, sub-sect. 6, which read together with sect. 55, sub-sect. 3, enables the Court to direct payment of all expenses of any party to the application provided they are expenses under the Act. In order to give effect to the word "expenses" in sect. 46, sub-sect. 6, it is necessary to refer it to something more than costs or charges incurred in carrying through the application to the Court, and no further limitation to the meaning of the word is required than that supplied by sect. 55, sub-sect. 3. It would be a singular *casus omissus* if expenses properly incurred by a tenant for life could be paid out of capital money, and yet there was no power to direct payment of them out of the settled property.

Hood, for the infant remaindermen.

Austen-Cartmell, for the mortgagees of the life estate.

KEKEWICH, J.:—

This is another point arising under the *Settled Land Act*, 1882, and perhaps of equal importance practically with that which I disposed of yesterday. Certainly, it is of considerable importance.

(1) 37 Ch. D. 327.

I have already decided that the costs of an abortive sale by a tenant for life, or, rather, the costs incurred by a tenant for life in attempting a sale wholly or partially unsuccessful, are costs payable out of capital moneys within the meaning of clause x of sect. 21 of the *Settled Land Act*, 1882; but now it appears that, strictly speaking, there is no capital money attributable to this particular settlement, or, at any rate, not enough to meet the costs properly incurred by the tenant for life, and the further question arises whether these costs can be directed to be paid out of the land, which would be treating the capital money arising by means of the sale as being the equivalent of the land. If the costs are properly payable out of the land, and the Court can so declare, the result, being expressed in proper form, will be to make them a charge on the land, and if they are charged on the land they could, of course, be raised as any other charge, or, in the particular instance, they can conveniently be raised under the will, which settles other land in a similar manner, and which appears to contain an express power to the trustees of the will to pay off charges affecting the lands held under the settlement. If that power did not exist I should not be disposed to give weight to the argument founded on the inconvenience of not reaching the lands in a direct way, but seeing that there is that power to raise the money I need not pause to consider whether it would be right to make a charge which would enable the tenant for life to raise the money by mortgage or otherwise than by sale, it being conceded, and being, in fact, part of my decision, that if he sold, the proceeds of sale would be applicable for payment of these costs. The Act does not say in so many words that costs incurred by the tenant for life shall be charged on the settled land, and without presuming to guess why that has not been said, though it is not difficult to conceive a good reason, it is sufficient to say that it is not there. But large powers are given to the Court by sect. 46, to which sect. 47 is supplemental, and the real question I have to decide is whether the powers given by sect. 46, sub-sect. 6, reach this particular case. It would have been, if I may venture to say so, more satisfactory if there had been words in the Act directed to this particular point, which must have been in the contemplation of

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those who framed the Act. I know that the point has been considered over and over again since the Act was passed, and that the question how far sums payable out of "capital money" are to be regarded as charged on the land or can be charged on land, has attracted the attention of the profession. However, there is no express direction, unless it is to be found in this sub-section 6; at least, I am not aware of any other section which, standing alone, apart from the purview of the Act, can help me in deciding this case, and neither Mr. *Brinton* nor Mr. *Butcher* referred to any sections other than those to which I am about to refer. Sect. 46 assigns all matters coming within the jurisdiction of the Court, to the Chancery Division, and then gives the Court certain powers, and, among others, by this sub-sect. 6, it gives the Court power to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application. It does not say the costs, charges, or expenses of any application, nor could the language properly have been so conceived, because, strictly speaking, there are not any charges, or expenses of an application. The liability incurred in respect of an application is costs, and the expression, "costs, charges, or expenses" obviously, I think, points to something beyond the liability incurred with reference to the application to the Court. Then, that being so, I have to inquire what the costs, charges, or expenses of the parties are. The difficulty here arises from the fact that the tenant for life sold outside the Court, that is, without the sanction of an order of the Court, but simply in exercise of the power which the Act gives him. It is necessary, therefore, to search narrowly and suspiciously for any authority on the part of the Court to allow him the expenses incurred in doing that which did not require the Court's sanction. I have before me an application the short effect of which is this: The tenant for life, not having succeeded in selling the land, desires to know, for the satisfaction of himself and the trustees, whether the costs which he has incurred in the abortive sale are properly payable out of capital money and money in hand, and I have heard that application, and decided it. Is not that an application on which I can deal with the costs, charges, and expenses of the parties, one of whom is the tenant for life, and if

so, do not these costs, charges, or expenses include the costs, charges, or expenses which I held ought to be paid to him out of capital moneys? On reflection, and having had the assistance of the two industrious and able counsel to whom I have referred, I think that, without straining the language of the Act, I may arrive at that conclusion. I think that the provision which most enables me to do so is that which has been more than once mentioned, viz., sect. 55, sub-sect. 3, because that provides a limit to the word "expenses."

Probably on sect. 46, sub-sect. 6, I should be bound to hold that costs, charges, or expenses meant those connected with the powers of the Act; but under sect. 55, sub-sect. 3, there is the express limitation, and, having that express limitation, the Court is prevented from going beyond what is indicated as right and reasonable. I may read sub-sect. 6 as providing that the Court may make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties who are before it in connection with the Act, or incurred under the Act, and I might further expand the words, if necessary. I have held that the costs now in question are costs, charges, and expenses properly incurred under the Act, and therefore, it seems to me that I may hold, and, if I may, I, of course, ought to hold, that these costs, charges, or expenses are now payable out of the settled property, because the same sub-section goes on to empower the Court to order that all or any of the costs, charges, or expenses be paid out of property subject to the settlement. Probably I need not go further, because sect. 47, which is consequential on sect. 46, states what is to happen when the direction is given. The result of that applied to the particular case, is to make the costs in law a charge on the land, and the trustees of the will may, if they think fit, in exercise of their powers, pay off this charge out of moneys in their hands under the will, and I understand they wish to exercise their discretion in that way. I think I ought to follow the words of the Act, and that I ought not to declare that the costs are payable out of and charged upon the settled land, but to order that the costs, charges, or expenses be paid out of the property subject to the settlement. Then I may go on to direct them to be raised by means of a charge on the settled

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property. That will put the trustees of the will in as good a position as if these costs were secured by an equitable charge. [His Lordship also said that the costs of the mortgagees of the life estate of the present application must be borne by the tenant for life.]

Solicitors: *Field, Roscoe, & Co.*, agents for *Ginn & Matthew, Cambridge; Prideaux & Sons; Wade & Lyall.*

C. C. M. D.

COOMBS *v.* WILKES.

ROMER, J.

1891

[1890 C. 999.]

June 6, 15.

Contract—Sale of Land—Description of Vendor—"Landlord"—Subsequent Letter referring to Contract and Vendor—Statute of Frauds, s. 4.

The defendant signed a document dated the 7th of October, 1889, whereby he agreed to purchase a freehold farm for £650, and stated that he had paid a certain sum by way of deposit to "Messrs. *R.* as agents for the vendor." The document continued: "I hereby agree to pay in the usual way for the tenant-right (the landlord to be considered as an outgoing tenant according to the custom of the county)."

The vendor's name (*Coombs*) was not mentioned in the document, and he did not sign it, but it was signed by a clerk of Messrs. *R.*

In a subsequent letter to the vendor's solicitor the defendant asked that the balance of the purchase-money might be allowed to remain on mortgage, and concluded: "Let me know by return of post, and then Mr. *Coombs* could sign off the deeds . . . . I should like a copy of our agreement":—

Held, that by the word "landlord" the vendor was not sufficiently described in the document of the 7th of October, 1889, and that such document was not a sufficient agreement within the *Statute of Frauds*.

Held, also, that the subsequent letter did not so clearly refer to the previous document, and shew the name of the vendor, as to cure the defect in such document.

THE Defendant, *Richard Alfred Wilkes*, signed a document which was as follows:—

"I, *Richard Alfred Wilkes*, of *Old Shirley, Southampton*, hereby agree to purchase the freehold hereditaments known as *Stock Bottom Farm*, situate in the parish of *Winterbourne Earls*, in the county of *Wiltshire*, with the appurtenances thereto belonging, for the sum of £650, and I have paid the sum of £20, by way of deposit and in part payment of the said purchase-money, to Messrs. *Rutter* of 5, *New Bridge Street, London, E.C.*, as agents for the vendor, and in addition to the purchase-money I hereby agree to pay in the usual way for the tenant-right (the landlord to be considered as an outgoing tenant according to the custom of the county), and further agree to execute a contract for the purchase of the said hereditaments when required, such contract to be prepared by the vendor's solicitor, and to complete the

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said purchase, and pay the remainder of the said purchase-money.

"(Signed) *R. A. Wilkes.*
"October 7, 1889.
"(Signed) *W. B. Gardner.*
"Clerk to Messrs. *Rutter*, 5, *New Bridge Street, E.C.*

"And I, the said *Richard Alfred Wilkes*, hereby further agree to complete the said purchase on or before the 30th day of November, instant, or in default to pay interest on the balance of the purchase-money at the rate of 5 per cent. per annum until completion. And to pay all solicitors' charges for conveyance and negotiation, and otherwise respecting the matter.

"Dated 19th November, 1889.
"(Signed) *R. A. Wilkes.*"

Messrs. *Rutter* were the auctioneers who were instructed by the Plaintiff, *George Coombs,* to sell the farm. The Defendant subsequently paid a further sum of £30 on account of the purchase-money, and on the 30th of November, 1889, he wrote to the Plaintiff's solicitor as follows:—

"Dear Sir,—Now I have paid the £50, could you arrange for the £600 to remain for one twelve [*sic*] and then I will pay off £100, as I cannot arrange two mortgages. I think I could get the £600 in *Southampton*, but I would rather have it with you. Kindly write and let me know by return of post, and then Mr. *Coombs* could sign off the deeds, as I do not want to keep him waiting any longer. I should like a copy of our agreement.

"Yours truly,
"*R. A. Wilkes.*"

Some correspondence afterwards passed between the solicitors of the parties; and, the Defendant having refused to complete the purchase, the present action was commenced, the Plaintiff claiming specific performance, payment of the balance of the purchase-money, and incidental relief.

The Defendant pleaded, amongst other things, that there was no memorandum in writing of the agreement such as to satisfy the requirements of the *Statute of Frauds.*

The action came on for trial on the 6th of June, 1891.

Gatey, for the Plaintiff:—

The vendor's name not being expressly stated in the document signed by the purchaser, the question is whether there is a sufficient agreement in writing within sect. 4 of the *Statute of Frauds*. The reference in the document to "the landlord," who is to go out of possession, is enough to shew that he is the vendor, and that is a sufficient description of the vendor. "Proprietor" has been held to be a sufficient description of the vendor: *Sale* v. *Lambert* (1); *Rossiter* v. *Miller* (2); though "vendor" alone is insufficient: *Potter* v. *Duffield* (3). Where the vendor was described as "a trustee selling under a trust for sale" the contract was held to be sufficient: *Catling* v. *King* (4). "The company" was held to be a sufficient description where it appeared that one particular company was in actual occupation: *Commins* v. *Scott* (5); and it is sufficient if the vendor is referred to as the "executor" of a person who is named in the contract: *Hood* v. *Lord Barrington* (6).

But, if the document of the 7th of October, 1889, is of itself insufficient to constitute a binding contract, the statement, in the letter of the 30th of November, 1889, of the vendor's name, coupled with the reference to "our agreement," is sufficient to satisfy the statute: *Warner* v. *Willington* (7).

The subsequent letters between the solicitors of the vendor and purchaser contain all the terms of a binding contract, and are signed by the agents of the parties.

[He also referred to *Long* v. *Millar* (8).]

Methold, for the Defendant:—

The reference to the landlord is not a sufficient description of the vendor. Anybody can enter into a contract to sell property, whether it is his own or not. Even if the landlord was the owner, that does not carry it any further, for there is nothing to identify him with the vendor. He might be agent for the vendor. The letter of the 30th of November, 1889, is not

(1) Law Rep. 18 Eq. 1.
(2) 3 App. Cas. 1124.
(3) Law Rep. 18 Eq. 4.
(4) 5 Ch. D. 660.
(5) Law Rep. 20 Eq. 11.
(6) Ibid. 6 Eq. 218.
(7) 25 L. J. (Ch.) 662.
(8) 4 C. P. D. 450.

ROMER, J. 1891 COOMBS v. WILKES.

sufficiently connected with the document of the 7th of October, 1889, by clear reference to supply what is omitted therefrom. The letters written by the defendant's solicitors do not make a contract binding on him, for the solicitors were not his agents to purchase, but were employed by him for another purpose. For instance, where solicitors have sent a draft contract to the intending purchaser, that has been held insufficient to make a binding contract: *Smith* v. *Webster* (1).

Gatey, in reply.

1891. June 15. ROMER, J.:—

It is agreed between counsel for the parties that the sole question I have to decide is whether, within the *Statute of Frauds*, who the vendor is is sufficiently stated. If so, then the Plaintiff is entitled to succeed; otherwise the Defendant is so entitled.

Now, it is admitted that the reference to the agents for the vendor in the document of the 7th of October, 1889, is insufficient. But it is said that it appears from that document, sufficiently to preclude any fair dispute, that the vendor is the landlord, and that therefore he is sufficiently described. But it appears to me that I cannot gather from the document, with any certainty, that the landlord is the vendor. I do gather that the "landlord" is in occupation, and that he is going out of possession in favour of the purchaser, and is to be paid tenant-right, and possibly I might also assume that by the term "landlord" (a curious term to use when, as appears from the document, there is no other tenant) is meant the owner. But this is quite consistent with the vendor being another person who has some power or right to sell (say, an equitable mortgagee), and who has arranged with the landlord to go out of occupation on being paid tenant-right; and it appears to me that I should be straining the law to hold in this case that the vendor is sufficiently described by the document to preclude any fair dispute as to his identity.

Then it is said that some subsequent letters so refer to the written contract and to the name of the vendor that they can be

(1) 3 Ch. D. 49.

used to supplement the written contract and supply the deficiency therein as to the vendor, and, in support of this, certain observations of Vice-Chancellor *Kindersley*, on a somewhat similar point which arose in *Warner* v. *Willington* (1), are relied on. I need not, however, consider whether those observations can be considered without modification as a true statement of the law, for, in my opinion, the present case does not fall within those observations, fairly understood. None of the letters here fall within the description of "a document which is sufficiently connected with the memorandum (that is, the written contract) by clear reference" so as to cure the defect of the memorandum, or of a letter, signed by the purchaser, so clearly referring to the memorandum and shewing the name of the vendor as to cure the defect.

For instance, from the letter by the Defendant of the 30th of November, 1889, I cannot gather with certainty that Mr. *Coombs*, because he is to sign the deeds, is the vendor in the written contract, or that the copy of "our agreement," mentioned in that letter, is a copy of the written contract in question, or that by "our agreement" is meant an agreement between the Defendant and *Coombs*.

And, as to the letters written by the Defendant's solicitors, I do not see how they can be taken to be his agents authorized to sign any "memorandum or note" of the contract within the statute.

It follows that I feel myself obliged, reluctantly, to hold that the defence succeeds. I accordingly dismiss the action, but, under the circumstances, without costs.

Solicitors for Plaintiff: *Purkis & Co., for Cobb & Smith, Salisbury.*

Solicitors for Defendant: *Chester & Co., for Page & Grierson, Southampton.*

(1) 25 L. J. (Ch.) 662.

F. E.

C. A.
1891
NORTH, J.
Jan. 29.
C. A.
May 1, 2;
June 11.

Applied. CURTIS v. CHEMICAL, ETC., CO. [1951] 1 K. B. 805

LOW *v.* BOUVERIE.

[1889 L. 1623.]

Mortgage—Life Interest—Trustee—Prior Incumbrances—Notice—Inquiry by Mortgagor—Fraud—Misrepresentation—Mistake—Liability of Trustee—Duty of Trustee—Contract—Warranty—Estoppel.

Although it is the duty of a trustee to give his *cestui que trust*, on demand, information with respect to the dealings with and position of the trust fund, it is no part of his duty to assist his *cestui que trust* in selling or incumbering his beneficial interest by telling him what incumbrances he, the *cestui que trust*, has created, nor which of his incumbrancers have given notice of their respective charges; and it follows that the trustee is under no obligation to answer the inquiries of a stranger about to deal with the *cestui que trust*.

If the trustee takes upon himself to answer the inquiries of a stranger about to deal with the *cestui que trust*, he is not under any legal obligation to do more than to give honest answers to the best of his actual knowledge and belief: he is not bound to make inquiries himself. Provided he answers honestly, he incurs no liability to the inquirer, unless he binds himself by a statement amounting to a warranty, or so expresses himself as to be estopped from afterwards denying the truth of what he has said.

A statement to operate as an estoppel must be clear and unambiguous.

The doctrine of *Derry* v. *Peek* (1)—that a person is not liable for a false representation upon the faith of which another person acts, even though carelessly made, provided he made it in the honest belief that it was true—does not apply where there is a legal obligation on the part of one person towards another to give him correct information; as, for instance, where the law of warranties or of estoppel is applicable.

Having regard to *Derry* v. *Peek*, *Burrowes* v. *Lock* (2) can now only be supported on the ground of estoppel.

Slim v. *Croucher* (3) cannot be supported on the ground either of warranty or of estoppel, and is therefore inconsistent with and is overruled by *Derry* v. *Peek*.

Per Lindley, L J.:—An incumbrancer of a trust fund who first gives notice to any of the trustees obtains priority over any prior incumbrancer who has given no notice to any of them; but notice to one does not affect the other trustees so as to make them liable for what they may do in ignorance of the notice to their co-trustee.

The doctrine of estoppel as applicable to innocent misrepresentations, discussed and explained.

B., being entitled under a settlement to a life interest in a trust fund,

(1) 14 App. Cas. 337. (2) 10 Ves. 470.
(3) 1 D. F. & J. 518.

applied to the Plaintiff for a loan on the security of such life interest, at the same time referring the Plaintiff to the Defendant, one of the trustees of the settlement, for information as to his, *B.*'s, means and position. The Plaintiff thereupon wrote to the Defendant inquiring what the trust fund consisted of, and whether *B.*'s life interest was subject to any incumbrances, but not stating that *B.* had applied for an advance. The Defendant replied that the life interest was subject to certain incumbrances, mentioning them, but did not say there were no others. The Plaintiff then made an advance to *B.* on the security of a mortgage by *B.* of his life interest. Subsequently the Plaintiff discovered that the life interest was subject to several incumbrances prior to his own, besides those the Defendant had mentioned, but the existence of which, as was admitted by the Plaintiff, the Defendant had forgotten when replying to the Plaintiff's inquiries, though he had had notice of them. The Plaintiff's security being insufficient, he brought an action against the Defendant to have him declared liable for the amount due on the security, alleging that the advance to *B.* was made upon the faith of the Defendant's written representations:—

Held, that the Defendant was not liable either on the ground of fraud, breach of duty, warranty, or estoppel.

Decision of *North*, J., reversed.

In January, 1888, Vice-Admiral *F. W. P. Bouverie*, who under the trusts of his marriage settlement, dated the 1st of September, 1845, was entitled for his life to the income of a sum of £5523 6*s.* 3*d.* Metropolitan 3½ per Cent. Stock, applied to a firm of solicitors who were in the habit of acting on behalf of the Plaintiff, *Robert Low*, in all loan transactions, to make him, Vice-Admiral *Bouverie*, an advance on the security of his life interest, and of certain policies of assurance on his life. The Defendant, *Henry Hales Pleydell Bouverie*, a banker, was one of the trustees of the settlement. In consequence of this application the Plaintiff's solicitors, on the 22nd of February, 1888, wrote on his behalf the following letter to the Defendant:—

"Dear Sir,—We are doing business with Vice-Admiral *Bouverie*, and he says you will give us information as to his means and position. He says he is entitled to a life interest in some funds held in trust, under a settlement dated the 1st of September, 1845, of which you are trustee. Will you kindly tell us what those funds are, and whether Vice-Admiral *Bouverie* is still entitled to the full benefit of his life interest therein. We understand he has not in any way mortgaged or parted with such life interest. Is this so? Your early reply will oblige."

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On the 23rd of February, 1888, the Defendant replied as follows:—

"Gentlemen,—In reply to your letter of 22nd inst. I beg to inform you that Vice-Admiral *Bouverie* has a life interest in £5523 6*s.* 3*d.* Metropolitan 3½ Stock, but the same life interest is charged with the payment of the premiums on two life policies, one of which amounts to £35 17*s.*, and the other is extinct. Also it is charged with payment of interest for money already advanced to him to the extent of £34 per annum."

On the 25th of February, 1888, the Defendant wrote again to the Plaintiff's solicitors as follows:—

"Gentlemen,—In furtherance of my letter to you of a day or two since, I beg to state that I hold a policy of insurance on Admiral *Bouverie's* life in the *Mutual Life Assurance Society* for £300, as security for the money advanced to him, for which the £34 mentioned to you is the annual charge of interest."

On the same day the Plaintiff's solicitors had written to the Defendant as follows:—

"Dear Sir,—Will you kindly inform us whether you hold any mortgage or know of any incumbrance upon Vice-Admiral *Bouverie's* life interest in the funds mentioned in your letter of the 23rd inst., or on his life interest under his marriage settlement. By so doing you will much oblige."

On the 27th of February, 1888, the Defendant replied to the last letter as follows:—

"Sirs,—I don't see how I can explain myself more clearly than I did the other day in my letter to you. I hold no mortgage from Admiral *Bouverie* for the charge of interest on money advanced to him; but this charge of interest is in the ordinary course of business; but the two policies of insurance, whose premiums now amount to £35, are mortgaged to his trustees."

The Plaintiff thereupon, without any further inquiry, agreed to advance £600 to Vice-Admiral *Bouverie* on the security of a mortgage of his life interest and two policies of assurance on his

life. The advance was accordingly made, and a mortgage was executed on the 1st of March, 1888, of which notice was duly given to the Defendant.

Towards the close of the year 1888, Vice-Admiral *Bouverie* was in pecuniary difficulties, and at present he was an undischarged bankrupt and residing out of the jurisdiction.

The interest on the Plaintiff's mortgage being in arrear, he, through his solicitors, in April, 1889, requested the Defendant to pay to him in future the balance of Vice-Admiral *Bouverie's* life income, after satisfying the charges mentioned in the Defendant's letters. A correspondence then ensued between the Plaintiff's and the Defendant's solicitors, from which the Plaintiff for the first time became aware that at the date of his mortgage Vice-Admiral *Bouverie's* life interest was already subject to no less than six prior mortgages, including a mortgage to secure the premiums on the policies mentioned in the Defendant's letter of the 23rd of February, 1888, two of the mortgages being to the trustees of the settlement of the 1st of September, 1845. It appeared, however, that, at the time he was corresponding with the Plaintiff's solicitors as above-mentioned, the Defendant had forgotten the existence of these prior mortgages, though he had had notice of them in the sense that they were recited in a deed of the 15th of February, 1885, by which he was appointed trustee of the settlement of the 1st of September, 1845.

The amounts secured by the six prior mortgages exceeded the capital value of the life interest and policies comprised in the Plaintiff's mortgage, and the interest payable on those six mortgages more than exhausted the income payable in respect of the life interest. To preserve his security the Plaintiff paid the premiums on the policies mortgaged to him.

Under these circumstances, there being due to him, besides the principal mortgage debt of £600, a sum due for interest, premiums, and costs, the Plaintiff brought this action, claiming a declaration that the Defendant was liable to pay to him the total amount due under his mortgage, and payment accordingly.

In his statement of claim the Plaintiff alleged that the Defendant, when he wrote his letters of the 23rd and 27th of

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February, 1888, knew that the information contained in them was sought from him as trustee of the settlement with the object of being communicated to some person who at that time contemplated lending money to Vice-Admiral *Bouverie* on the security of his life interest and policies; also, that the contents of those letters having been communicated to the Plaintiff, he, relying thereon, made the advance of £600 on the security of the mortgage of the 1st of March, 1888.

In his statement of defence the Defendant denied that he knew the information contained in his letters was sought from him as trustee with the view to a loan to any person; that, although the Plaintiff's solicitors spoke of "doing business" with Vice-Admiral *Bouverie*, they never gave him, the Defendant, any intimation that a loan to the Vice-Admiral was in contemplation; that the statements in both his—the Defendant's—letters were correct; that he owed no duty and was under no obligation to the Plaintiff or his solicitors to give any more definite or detailed answers to the questions put to him; that he never in fact answered the question which related to the knowledge of incumbrances, and that, if the Plaintiff desired to make him responsible for the information contained in his letters, the Plaintiff ought to have called his attention to the omission, and to have stated specifically the purpose for which the information was requested. The Defendant admitted that he had had notice of the six prior mortgages, but alleged that, when he replied to the letters of the Plaintiff's solicitors, he did not recollect those mortgages, or that he had ever had notice of them. He accordingly submitted that, under the circumstances, the Plaintiff was not entitled to the relief claimed.

Issue having been joined, the parties signed admissions, by which the existence of the six prior mortgages was admitted; and it was also admitted on the part of the Plaintiff that the Defendant had had notice of them, but that at the time he wrote the letters above mentioned he did not recollect that he had received such notice, or that he was otherwise aware of those prior mortgages being in existence.

The action came on for trial before Mr. Justice *North* on the 29th of January, 1891.

Everitt, Q.C., and *Charles Church*, for the Plaintiff:—

Though the Defendant had forgotten the existence of the other charges on the life interest of which he had received notice, he is bound to make good the loss which the Plaintiff has sustained by that which was in fact an erroneous statement: *Burrowes* v. *Lock* (1); *Slim* v. *Croucher* (2). The decision of the House of Lords in *Derry* v. *Peek* (3) does not apply. Lord *Herschell* (4) expressly states that *Burrowes* v. *Lock* is unaffected by the decision, and the other learned Lords assented to this view. And in *Brownlie* v. *Campbell* (5), Lord *Selborne* (6) also pointed out this distinction. *Peek* v. *Gurney* (7), and *Arkwright* v. *Newbold* (8), apply.

Cozens-Hardy, Q.C., and *Morshead*, for the Defendant:—

To hold the Defendant liable in such a case as the present would be to go far beyond *Burrowes* v. *Lock* and *Slim* v. *Croucher*. The Defendant stated the truth, and he omitted to answer the latter part of the question put to him. He cannot be made liable for his omission: *Stephens* v. *Venables* (9).

The reference was made to the Defendant really in his character of banker, not in that of trustee.

NORTH, J.:—

The point here is a very short one, and I think the case is very clear. The Defendant was one of the two trustees of a settlement, under which Vice-Admiral *Bouverie* was entitled to a life interest. Vice-Admiral *Bouverie* was negotiating with the Plaintiff, through his solicitors, for an advance of money to be made to him on the security of his life interest. Before deciding whether an advance should be made it was necessary to know what was the position of Vice-Admiral *Bouverie* with regard to the life interest which was proposed as security, and the Plaintiff's solicitors thereupon wrote this letter.

(1) 10 Ves. 470.
(2) 1 D. F. & J. 518.
(3) 14 App. Cas. 337.
(4) Ibid. 360.
(5) 5 App. Cas. 925.
(6) Ibid. 935.
(7) Law Rep. 6 H. L. 377.
(8) 17 Ch. D. 301.
(9) 31 Beav. 124.

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[His Lordship read the above letter of the 22nd of February, 1888.]

I do not think that any intelligent man could doubt for a moment what the true meaning of that letter was. The proposed mortgagee of the interest of the *cestui que trust* writes to the trustee for information as to the position of the funds in which his *cestui que trust* was interested. It is said that the Defendant was merely told that the solicitors were "doing business with the *cestui que trust*"; but it is clear that the business was one of a pecuniary character, for it is plain that they were thinking of making an advance to him, and wanted to know what prior incumbrances there were upon his interest, and when they say at the end of the letter, "we understand he has not in any way mortgaged or parted with such life interest. Is this so?" no intelligent man, much less an intelligent banker, could have had any doubt what was meant by it.

[His Lordship read the Defendant's reply of the 23rd of February.]

That is a very clear and distinct answer to that part of the letter which asks whether Vice-Admiral *Bouverie* has in any way mortgaged or parted with his life interest, meaning of course to any one. Well, that letter was followed up by a further explanation from the Defendant, given no doubt after making inquiry and obtaining some further information.

[His Lordship read the Defendant's letter of the 25th of February.]

That letter was crossed by a letter of the Plaintiff's solicitors, dated the same day, which was answered by the Defendant's letter of the 27th of February.

[His Lordship read both the letters, and continued:—]

Therefore, in reply to the question, whether the Defendant held any mortgage, or knew of any incumbrance to any one else, on the Admiral's life interest, the Defendant said, "I cannot give you any answer except what I have already told you." In point of fact, at that time the Defendant knew of six other mortgages already made by Vice-Admiral *Bouverie* upon his life interest. When I say he knew of them, I do not forget that it is said (and I accept that as true) that, although he had had notice of them,

he had forgotten their existence when he wrote that letter, which, I have no doubt, was written *bonâ fide*. But the result was this, that a representation was made by a person who had had notice of prior mortgages, and who ought to have known of their existence, that in fact there were no mortgages or incumbrances on the life interest, except what he had already mentioned. That statement was, unfortunately, untrue, although by reason of the Defendant's forgetfulness he did not know that it was untrue at the time when he made it. I think it is clearly settled by authority that, when a trustee is applied to for information with regard to incumbrances on his trust fund, and he gives a distinct answer that there is nothing of the sort, the fact that he has forgotten the existence of an incumbrance is no excuse for him whatever. *Burrowes* v. *Lock* (1) and *Slim* v. *Croucher* (2) are clear upon this point. In *Burrowes* v. *Lock* the person held liable was a trustee. In *Slim* v. *Croucher* the person held liable was not a trustee; he was a lessor, who, it having been stated by one *Hudson*, an intending borrower, that he had agreed to grant a lease to *Hudson*, was asked by the plaintiff, the intending lender, whether he would grant a lease according to his agreement, and his answer was: "I am quite agreeable to grant a peppercorn lease of ground on which four houses are erected, situate at *Bromley*, to Mr. *Hudson*." He had in fact already granted a lease of the property to *Hudson*, which *Hudson* had assigned for value, and he did not mention this lease. His answer, beyond all question, amounted to a statement that he was in a position to grant a lease, and that he had not already granted a lease of the property. The present case is, in my opinion, a much stronger one, for the Defendant's letter clearly contained a misrepresentation (though an unintentional one) with respect to a matter within his knowledge, when he knew that the person to whom the information was given was about to act on the communication made by him, and he is responsible, therefore, for his statement turning out to be incorrect. The Defendant is, therefore, liable for the loss which the Plaintiff has sustained by reason of his misrepresentation, although in fact

(1) 10 Ves. 470. (2) 1 D. F. & J. 518.

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the misrepresentation was made through forgetfulness on the part of the Defendant.

Then arises the question, For what amount is the Defendant liable? Clearly for the whole amount advanced by the Plaintiff, because it has turned out that the previous charges were such as entirely to exhaust the value of the life interest of Vice-Admiral *Bouverie*. The whole amount advanced by the Plaintiff was lost, and the Defendant is liable for the £600 advanced, and for the interest which ought to have been received by the Plaintiff on the mortgage, but which has been lost by reason of the advance having been made on a worthless security; and, in my opinion, the Defendant is also liable for the premiums which the Plaintiff has paid upon the policies.

On looking at *Slim* v. *Croucher* (1) and *Burrowes* v. *Lock* (2), it is clear that an action of this sort, whether brought at Law or in Equity, is an action for damages, and the question is, what damage the Plaintiff has sustained by the representation, having regard to this, that it must be only such damage as must be reasonably taken to have been in the contemplation of the parties at the time when the representation was made. I hold, upon the construction of the letters, that the Defendant was told that the Plaintiff was about to advance money on the security of the life interest. He must have known very well, that an advance upon the security of a life interest is always collaterally secured by a policy or policies of insurance, and in fact he mentioned, in answer to the questions put to him, that a previous advance was secured by policies of insurance in respect of which premiums were paid. The Plaintiff was about to advance money on a mortgage of the life interest, and the Defendant must have known that in such a case the Plaintiff would have to pay the usual premiums on a policy of insurance, and that the amount of the premiums which he would have to pay would be part of the damage which the Plaintiff would be entitled to recover in an action for misrepresentation. The amount of the premiums which the Plaintiff has paid up to the present time is shewn to be £228 18*s.* 11*d.*; and, therefore, I must hold the Defendant

(1) 1 D. F. & J. 518. (2) 10 Ves. 470.

liable for the £228 18*s.* 11*d.* paid for premiums, and interest thereon.

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I shall give both parties liberty to apply, because in case the money should not be paid by the Defendant before the next premium becomes due, and the Plaintiff has to pay that premium, he will be entitled to add the amount to the damages. On the other hand, if the Defendant pays the amount of the damages, he will be entitled to stand in the place of the Plaintiff, and to have the benefit of the policy for the amount which he pays.

W. L. C.

From this decision the Defendant appealed. C. A.

The appeal was heard on the 1st and 2nd of May, 1891.

Rigby, Q.C., *Cozens-Hardy*, Q.C., and *Morshead*, for the Appellant:—

If it was the Appellant's duty to give full and accurate information to the Plaintiff, we admit that he did not discharge that duty; but we say that he was under no legal obligation to give it. He was not bound to give any information at all to a person who was a stranger to the trust. He made no negative statement; he did not say that the incumbrances he mentioned were the only ones. He answered the inquiry honestly, to the best of his recollection, it not being present to his mind that he had received notice of other incumbrances. Even if he had said there were no others, he would not be liable unless he made the statement dishonestly. The Plaintiff relies on *Burrowes* v. *Lock* (1). It is difficult to see how that case can stand with *Derry* v. *Peek* (2); but at all events in the former case there was a distinct positive misrepresentation; here there was no misrepresentation at all—there was only a statement which was perfectly true. *Slim* v. *Croucher* (3), relied on by Mr. Justice *North*, was not the case of a trustee, but of a landowner agreeing to grant a lease when he had in fact granted one already, so that the lease which he afterwards granted was worthless. Unless that case can be supported on the ground of warranty, it is

(1) 10 Ves. 470. (2) 14 App. Cas. 337.
(3) 1 D. F. & J. 518.

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inconsistent with *Derry* v. *Peek* (1), for there was no element of dishonesty in the transaction. In *Re Ward* (2) the position of the solicitor made it his duty to make correct statements, and the case stands on quite a different footing. Where there is no duty to get and communicate correct information there must be something amounting to fraud to give a right to relief: *Derry* v. *Peek*; *Brownlie* v. *Campbell* (3).

Everitt, Q.C., and *Charles Church*, for the Plaintiff:—

In *Derry* v. *Peek* the House of Lords did not intend to interfere with the settled course of decisions in Equity. The Courts of Equity had laid down that a trustee was subject to an obligation expressed in *Browne* v. *Savage* (4), where it is said that persons proposing to advance money on the security of trust property have no means of ascertaining whether there are prior charges but by applying to the trustees, "who must, for their own security, give correct information, when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property." Here the Defendant, having once elected to answer certain inquiries, was bound to give full information; if he did not recollect whether there were other incumbrances or not, he was bound to say so. His only partially answering the inquiries was equivalent, in Equity, to misleading, and so involved him in liability. *Brownlie* v. *Campbell* (5) was a case of vendor and purchaser, and has no application to a case like the present, which, as pointed out in that case (6), is really covered by *Burrowes* v. *Lock* (7) and *Slim* v. *Croucher* (8). "The mere fact of forgetfulness by a man who has known a certain fact, who is asked whether that fact has happened or not, and says positively that it did or did not, cannot possibly be an excuse"; by saying that the fact was not so, he takes upon himself the responsibility of a positive statement: *Brownlie* v. *Campbell* (9), where it is pointed out (10) that in *Burrowes* v. *Lock* the answer of the trustee to the intending

(1) 14 App. Cas. 337.
(2) 31 Beav. 1.
(3) 5 App. Cas. 925, 950.
(4) 4 Drew. 635, 639.
(5) 5 App. Cas. 925.
(6) 5 App. Cas. 935, 936, 953.
(7) 10 Ves. 470.
(8) 1 D. F. & J. 518.
(9) 5 App. Cas. 936.
(10) Ibid. 953.

lender, that there was no incumbrance, amounted to a warranty or contract that there was none.

[LINDLEY, L.J.:—*Burrowes* v. *Lock* (1) can only stand consistently with *Derry* v. *Peek* (2) on the ground of estoppel. I cannot see how it can do so except on that principle.

KAY, L.J., upon the point of estoppel, mentioned *In re Bahia and San Francisco Railway Company* (3).]

It is an established principle of Equity that a case in which a person stands in the position of trustee must be distinguished from the class of cases of which *In re Bahia and San Francisco Railway Company* is an example. Supposing a trustee, having had notice of a charge upon a trust fund, nevertheless paid the fund over to some one else, he would be liable to the person entitled to the charge, even though, as here, his excuse was that he had forgotten all about it. So a trustee, having had notice of assignment of a life interest in the trust fund to certain persons, is in the position of trustee for those persons.

[LINDLEY, L.J.:—This seems to be a case of estoppel or nothing.]

We contend that the Defendant must be treated as having taken upon himself the responsibility of a positive statement, upon the faith of which he knew the Plaintiff was going to deal for valuable consideration: *Brownlie* v. *Campbell* (4).

[KAY, L.J.:—In *Freeman* v. *Cooke* (5), Baron *Parke*, referring to the rule laid down in *Pickard* v. *Sears* (6), says: "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by

(1) 10 Ves. 470.
(2) 14 App. Cas. 337.
(3) Law Rep. 3 Q. B. 584.
(4) 5 App. Cas. 936.
(5) 2 Ex. 654, 663.
(6) 6 Ad. & E. 469, 474.

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negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."]

That is so, and upon that doctrine we rely; and there are several other authorities to the same effect, such as *Carr* v. *London and North-Western Railway Company* (1) and *York Tramways Company* v. *Willows* (2). If a man chooses to answer inquiries at all he must do so fully, and not lull the other party into the belief that his inquiries have been answered. A partial and fragmentary statement of fact, so that the withholding of that which is not stated makes that which is stated absolutely false, is sufficient ground for an action for misrepresentation: *Peek* v. *Gurney* (3). As was said in *Burrowes* v. *Lock* (4), it was at least gross negligence on the part of this Defendant to take upon himself to aver positively and distinctly, or lead the Plaintiff to believe, that there were no charges or incumbrances beyond those already stated, without taking the trouble to recollect whether the fact was so or not.

[Lindley, L.J. (having sent for the Registrar's book containing a copy of the pleadings and decree in *Burrowes* v. *Lock* (5)):—

(1) Law Rep. 10 C. P. 307, 316–7.
(2) 8 Q. B. D. 685, 699.
(3) Law Rep. 6 H. L. 377, 403.
(4) 10 Ves. 470, 476.
(5) The following is a report of the facts, pleadings, and decree in *Burrowes* v. *Lock*, taken from the records of the case in Chancery Orders (Reg. Lib. 1804, A, p. 342):—

Burrowes *v.* Lock.

Thomas Cartwright, who died in 1787, by his will, made in 1778, gave his residuary estate to his executors, the defendant, *James Lock*, and two other persons, upon trust for his, the testator's, children equally. Part of the residuary estate consisted of a debt of £2600 due from Lord *Dillon* to the testator. The testator left nine children surviving him. The defendant *Edward Cartwright*, as one of such children, was entitled to £288 17*s.* 9*d.*, being his one-ninth of the £2600. By a deed of the 21st of November, 1801, *Edward Cartwright*, in consideration of £132, assigned his £288 17*s.* 9*d.* to the plaintiff, who thereupon gave *James Lock* notice of the assignment. On the 20th of November, 1802, the £2600 was paid to *Lock* as the then surviving executor of the will; and he, having paid eight-ninths of it to the brothers and sisters of *Edward Cartwright*, retained the latter's one-ninth—*i.e.*, £288 17*s.* 9*d.* On the plaintiff applying to *Lock* for payment of that sum, the defendant, *James Cartwright*, a brother of *Edward Cartwright*, set up a claim to 10 per cent. of it, under what appeared to be a deed of family arrangement, dated in 1790, whereby, amongst other things, it was agreed that *Edward*

The report of *Burrowes* v. *Lock* (1) is not quite intelligible, for it leaves out the prayer and the decree. When the prayer and decree are looked at it becomes intelligible enough.]

Cartwright's share of the £2600 should be subject to a deduction of 10 per cent. in favour of *James Cartwright.*

The bill of complaint, having stated the particulars of the assignment of the 21st of November, 1801, proceeded as follows:—

"The plaintiff charges that, prior to the time of making the said assignment, application was made on the part of the plaintiff unto the defendant *Lock*, to know whether the defendant *Edward Cartwright* was absolutely entitled to the said one-ninth part of the said debt; and the defendants respectively, and particularly the defendant *Lock*, prior to the plaintiff's said purchase and assignment, did give the plaintiff an answer in the affirmative; and particularly the defendant *Lock*, prior to the said transaction, and in November, 1801, did write a letter to the plaintiff, to the effect following, viz.: 'Sir—*William Edward Cartwright* is entitled to his share of money secured by debentures on Lord *Dillon's* estate, when sold to pay them off, which he can dispose of to any one.—I am, &c., *Jas. Lock*;' and, upon the faith of the said letter from the defendant *Lock*, the plaintiff actually purchased the defendant *Edward Cartwright's* said one-ninth share of the said debt, without knowing that the other defendant, *James Cartwright*, had any right or deduction whatsoever out of the same; for, although the defendants respectively, and particularly the defendant *Lock*, before and at the time of the plaintiff's purchasing the defendant *Edward Cartwright's* said share in the said debt, had been apprised and did suspect that the defendant *James Cartwright* had a claim of a deduction of 10 per cent. out of the said defendant *Edward Cartwright's* said share, and had some notice relating thereto, yet they did not disclose the same to the plaintiff or give him the least notice thereof; and the plaintiff charges that he did *bonâ fide* pay the whole of the consideration money expressed in the said deed of assignment for the purchase of his one-ninth part of the said debt; and the plaintiff charges that the said deed of assignment is a valid deed on the part of the plaintiff; and in case the defendant *James Cartwright* is entitled to have any deduction out of the said share so assigned to the plaintiff as aforesaid, then the said defendants, and particularly the defendant *Edward Cartwright* in the first instance, and in case of his default then the defendant *Lock*, ought to make good the same, and therefore that the said defendants might answer the several matters aforesaid; and that the said defendant *James Lock* might be decreed to pay and satisfy to the said plaintiff the said sum of £288 17*s.* 9*d.*, being the one-ninth part or share of the said sum of £2600 so purchased by and assigned to the plaintiff as aforesaid, together with interest and costs; and in case the defendant *James Cartwright* was entitled to and should be paid anything from and out of the said debt or money so assigned to the plaintiff as aforesaid, then that

(1) 10 Ves. 470.

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Mere forgetfulness on the part of a person making a representation to another person is sufficient to entitle the latter to relief: *Slim* v. *Croucher* (1).

the defendants, and particularly the defendant *Edward Cartwright* in the first place, and, in default of payment by him, then that the defendant *Lock* might answer and make good the same with interest unto the plaintiff; and for relief in the scope of the said plaintiff's bill."

The defendant *Edward Cartwright*, by his answer, submitted that, under the circumstances therein mentioned, the plaintiff ought not to be allowed to have the benefit of the assignment of the 21st of November, 1801, or to receive payment of *Edward Cartwright's* share of the £2600. The defendant, *James Lock*, by his answer, admitted having had notice from the plaintiff of the assignment of the 21st of November, 1801, and said he apprehended that the £288 17*s.* 9*d.* was subject to a deduction of 10 per cent. to *James Cartwright*. He submitted that, *James Cartwright* having made the claim, he, *Lock*, could not, as trustee, with safety to himself, pay over *Edward Cartwright's* share of the £2600 to the plaintiff, but expressed his willingness to act as the Court should think proper. The plaintiff's bill having been amended, the defendant *Edward Cartwright* put in an answer to it, admitting that *James Cartwright* claimed the 10 per cent.; and he stated that he believed that the plaintiff, previous to his purchase, did inquire of *Lock* as to whether he, *Edward Cartwright*, was absolutely entitled to his one-ninth, and that *Lock* wrote the letter above mentioned, though he, *Edward Cartwright*, did not know whether the plaintiff purchased the share without knowing that *James Cartwright* claimed any deduction out of it; but if the plaintiff did purchase without knowledge of the claim, he, *Edward Cartwright*, denied that the same was wilfully suppressed by him from the plaintiff; and he believed that, had the plaintiff asked *Lock* whether there was any incumbrance affecting his (*Edward Cartwright's*) share, which inquiry was not made, *Lock* would have given him every information; and that he, *Edward Cartwright*, did not think of mentioning it as it would naturally be discovered on an investigation of the title. The defendant *James Lock*, by his answer to the amended bill, admitted the plaintiff having made the inquiry of him, and that he did write the letter; he alleged, however, that he did not recollect ever having said that *Edward Cartwright* could dispose of his share free from any deduction, or that any such question was ever asked of him, but that the inquiry was whether *Edward Cartwright* could sell his share, to which his (*Lock's*) answer was that he could, and this, he submitted, was the import of his letter; and he altogether denied any wilful suppression, saying that, had the plaintiff asked him whether there was any incumbrance affecting *Edward Cartwright's* share, he would not have hesitated giving him any information in his power. He admitted having, before the plaintiff's purchase, heard of *James Cartwright's* claim, but alleged that, it being a matter in which

(1) 1 D. F. & J. 518.

[BOWEN, L.J.:—If the law, at the time that case was decided, was as it seems to have been—according to *Stranks* v. *St. John* (1)—that an agreement to grant a lease must be treated as an agreement to grant a good lease, then there was in that case a good promise, on which an action at law could be maintained.]

Lord *Campbell* in that case followed *Burrowes* v. *Lock* (2), which he considered was "a sound decision."

[LINDLEY, L.J.:—At that time opinion seems to have been fluctuating as to whether Courts of Law and Courts of Equity had a common jurisdiction in that class of cases. In the present case, if the Defendant's letters amount to a representation that the property is free from incumbrances, then it is a case of estoppel. But supposing the true interpretation of the letters is, "so far as I know there is no charge," is there estoppel then?]

Two of the prior charges were charges to the trustees of the settlement, one of whom was the Defendant himself, so that as to those two charges, at all events, there was distinct misrepresentation. The deed under which he became a trustee actually recited

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he himself was not interested, he gave himself no concern about it, nor did it enter his mind during any of the times he saw the plaintiff or when he wrote the letter. He admitted that he did not disclose the matter to the plaintiff before the purchase, but said this was entirely accidental, and he submitted to act as the Court should direct. The defendant *James Cartwright* also put in an answer, claiming to be paid the 10 per cent. out of *Edward Cartwright*'s share, and that his interest in such share could not be affected by any transaction that might have taken place between *Edward Cartwright* and the plaintiff.

The case having been argued and the letter from *Lock* to the plaintiff produced and put in evidence, a decree was pronounced, "that the defendant *James Lock* do pay to the plaintiff the sum of £288 17*s.* 9*d.*, being one ninth part or share of the sum of £2600 purchased by the plaintiff of the defendant *Edward Cartwright* and assigned to him by the indenture of the 21st day of November, 1801, subject to a deduction of £10 per cent. to the defendant *James Cartwright*; and it is ordered that the defendants *Edward Cartwright* and *James Lock* do jointly pay to the plaintiff the £10 per cent. hereinbefore directed to be deducted out of the said £288 17*s.* 9*d.*; and it is ordered that the plaintiff do pay unto the defendant *James Cartwright* his costs of this suit to be taxed," &c., and that "the costs which the plaintiff shall so pay unto the said *James Cartwright* be repaid to him by the defendant *James Lock*; and, as between the plaintiff and the said defendants, *James Lock* and *Edward Cartwright*, no costs on either side:" liberty to apply.

(1) Law Rep. 2 C. P. 376.

(2) 10 Ves. 470.

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the prior charges. The natural conclusion which the Plaintiff's solicitor would draw from reading the Defendant's reply of the 27th of February to the letter of the 25th of February would be that there was no charge beyond what was mentioned in that letter.

[KAY, L.J.:—Fraud is admittedly out of the case. Does the Defendant, in his letter of the 27th of February, mean to say, "There are no charges but those I have mentioned"—in which case he might be estopped? Or does he not mean to say merely, "So far as I know, there is no other charge"? If he means the latter, is he estopped?]

Equivocal expressions must be regarded in the same way as equivocal conduct. The opening words of the Defendant's letter of the 27th of February import a positive statement constituting upon the facts and the authorities a misrepresentation.

[KAY, L.J.:—The authorities you rely upon seem rather to apply to a case where a man makes a dishonest statement. If he makes an honest statement, is he estopped?]

An ambiguous statement must be construed strictly against the person making it.

[KAY, L.J.:—In *General Finance, Mortgage and Discount Company* v. *Liberator Permanent Benefit Building Society* (1) Sir *George Jessel* said that a statement, to operate as an estoppel, must be distinct and precise. What do you say is a statement sufficient to constitute an estoppel?]

A statement which it is possible to construe in two ways; and such a statement we have here.

[BOWEN, L.J.:—It seems evident from the letter of the Plaintiff's solicitors of the 25th of February, that at that time, at all events, the Defendant's previous letter had not produced on their minds the impression that there was no other charge.]

The Defendant's reply of the 27th was certainly calculated to produce that impression, and we have the fact that without making any further inquiry the Plaintiff agreed to make the loan. What was more likely to lull the Plaintiff into security

(1) 10 Ch. D. 15.

than to say, "I do not see how I can explain myself more clearly than I did the other day in my letter to you"?

Rigby, in reply.

1891. June 11. LINDLEY, L.J. (after stating the facts and reading the correspondence, continued):—

This appeal raises several extremely important questions. First, it is necessary to consider what are the duties of trustees towards persons about to deal with their *cestuis que trust*, and who, before dealing with them, make inquiries of their trustees as to any assignments or incumbrances known to them.

In *Browne* v. *Savage* (1), Vice-Chancellor *Kindersley* said that trustees "must, for their own security, give correct information, when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property." Mr. *Lewin*, in his well-known work (*Lewin* on Trusts (2)), refers to that case as an authority for the proposition that trustees are bound to answer such inquiries. But when this opinion is examined it can scarcely be supported, and if such a doctrine were logically carried out it would impose very serious duties upon trustees. The duty of a trustee is properly to preserve the trust fund, to pay the income and the *corpus* to those who are entitled to them respectively, and to give all his *cestuis que trust*, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is. But it is no part of the duty of a trustee to tell his *cestui que trust* what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his *cestui que trust* in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the *cestui que trust* himself. There is no trust or other relation between a trustee and a stranger about to deal with a *cestui que trust*, and although probably such a person in making inquiries may be regarded as authorized by the *cestui que trust* to make them, this view of the

(1) 4 Drew. 635, 639. (2) 8th Ed. p. 704.

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stranger's position will not give him a right to information which the *cestui que trust* himself is not entitled to demand. The trustee, therefore, is, in my opinion, under no obligation to answer such an inquiry. He can refer the person making it to the *cestui que trust* himself.

I will next take the case of a trustee who answers the inquiry. What in this case is the extent of his obligation? Is he bound to find out the facts—bound to make inquiries of his co-trustees, or of the solicitor to the trust? Or is his obligation limited to giving such information as he himself can give without inquiry or research? I am not aware of any principle or authority which imposes upon him any obligation to do more than give an honest answer to the inquiry—that is to say, to do more than answer to the best of his actual knowledge and belief. He may, no doubt, undertake a greater responsibility; he may bind himself by a warranty, or he may so express himself as to be estopped from afterwards denying the truth of what he said; but unless he does one or the other, I do not know on what principle consistent with *Derry* v. *Peek* (1) he can, if he answer honestly, expose himself to liability. I say, "consistent with *Derry* v. *Peek*," because, until that case was decided, it was generally supposed to be settled in Equity that liability was incurred by a person who carelessly, although honestly, made a false representation to another about to deal in a matter of business upon the faith of such representation: *Burrowes* v. *Lock* (2); *Slim* v. *Croucher* (3). This general proposition is, however, quite inconsistent with *Derry* v. *Peek*. I do not, however, understand *Derry* v. *Peek* to apply where there is a legal obligation on the part of the defendant towards the plaintiff to give him correct information. If such an obligation exists, an action for damages will, I apprehend, lie for its non-performance, even in the absence of fraud: see *per* Lord *Denman* in *Barley* v. *Walford* (4). It is for this reason that I have examined the obligation of trustees to answer inquiries made by persons about to deal with their *cestuis que trust*. There is no equitable, as distinguished from legal, obligation to answer such inquiries, and if a trustee gives an

(1) 14 App. Cas. 337.
(2) 10 Ves. 470.
(3) 1 D. F. & J. 518, 525.
(4) 9 Q. B. 197, 208.

honest answer he discharges the only obligation which he is under.

Again, *Derry* v. *Peek* (1) does not in any way affect the law relating to warranties, unless it be by negativing the notion that promoters who issue a prospectus impliedly warrant the truth of the statements contained in it. Nor does *Derry* v. *Peek* in any way affect the law relating to estoppel where such law is applicable. But estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself. Lord *Herschell*, in his judgment in *Derry* v. *Peek*, did not profess to overrule *Burrowes* v. *Lock* (2) and *Slim* v. *Croucher* (3), and it was strenuously contended that those cases were still law, and that they governed the present case. It becomes necessary, therefore, to examine those cases with care.

Burrowes v. *Lock*, as appears from the Registrar's book, was a suit by the assignee of one of several residuary legatees for his share of the residue of a testator's estate. The amount of the residue was not in controversy, and a general administration decree was not sought. The defendants to the suit were the plaintiff's assignor and the trustee of his share of the residue. The trustee had (as appears from the report in *Vesey*) informed the plaintiff that this share was unincumbered, whereas, in fact, it was not. The decree was, in effect, that the trustee should pay the full amount of the share to the plaintiff without deducting the incumbrance. The trustee, even if he acted honestly, which is, perhaps, questionable, was clearly estopped from denying that the share was unincumbered. This decision was in 1805, more than thirty years before *Pickard* v. *Sears* (4), and at a time when the doctrine of estoppel was less accurately defined than it has since become. Regarded as a decision on the ground of estoppel, *Burrowes* v. *Lock* appears to me not only to have been quite right, but to remain wholly untouched by *Derry* v. *Peek*. Lord *Blackburn* seems to have thought that the representation in *Burrowes* v. *Lock* was scarcely distinguishable from a warranty: *Brownlie* v. *Campbell* (5); and if this be the proper view to take

(1) 14 App. Cas. 337.
(2) 10 Ves. 470.
(3) 1 D. F. & J. 518.
(4) 6 Ad. & E. 474.
(5) 5 App. Cas. 953.

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of it, *Burrowes* v. *Lock* (1) can stand on that ground, although I confess my own inability to sustain it on the ground of warranty.

Slim v. *Croucher* (2), in which *Burrowes* v. *Lock* was recognised and extended, cannot, in my opinion, be supported on the ground of estoppel. *Slim* v. *Croucher* was a suit in equity to recover money advanced on a lease granted by the defendant to the borrower, and which the defendant had told the plaintiff would be granted. The lease proved to be invalid. Unless the defendant's statement amounted to a warranty that the lease when granted would be valid, I do not myself see how to avoid the conclusion that *Slim* v. *Croucher* is inconsistent with, and therefore overruled by, *Derry* v. *Peek* (3). Lord *Herschell*, in his judgment, did not himself examine these cases, but intimated that the two might stand together upon the grounds explained by Lord *Selborne* in *Brownlie* v. *Campbell* (4). I am not, however, myself able to reconcile those grounds with the decision in *Derry* v. *Peek*. *Slim* v. *Croucher* evidently proceeded upon the notion, sanctioned by the high authority of Lord *Campbell*, that in that case an action for damages might have been maintained at law upon the defendant's representation, and that in such a case the Court of Chancery had a concurrent jurisdiction with the Courts of Common Law. There would be no such jurisdiction in the case of a warranty. *Slim* v. *Croucher* was not decided, nor did Lord *Selborne* approve it, on any such ground.

The only conclusion I can arrive at is, that whilst *Burrowes* v. *Lock* can be supported and taken as a guide on the ground of estoppel or possibly fraud, *Slim* v. *Croucher* cannot any longer be regarded as having been rightly decided, fraud having been negatived. As pointed out by Lord *Blackburn* in *Brownlie* v. *Campbell* (5), the line between fraud and warranty is often very narrow, and the same observation is true of the line between warranty and estoppel. Narrow, however, as the line often is, the three words denote fundamentally different legal conceptions which must not be confounded.

Reverting now to the grounds of liability on which this action may be supported, it is obvious that as regards warranty, the

(1) 10 Ves. 470.
(2) 1 D. F. & J. 518.
(3) 14 App. Cas. 337.
(4) 5 App. Cas. 936.
(5) 5 App. Cas. 953.

Plaintiff and the Defendant were not contracting parties. There was no intention to contract, nor was there any consideration which is essential for the purpose of treating what the Defendant said as a promise or a warranty. As regards estoppel, if the Defendant had said that there were no incumbrances on Admiral *Bouverie's* life interest except those mentioned by the Defendant in his letters, the case would be clearly one of estoppel; it would be undistinguishable from *Burrowes* v. *Lock* (1); and the Plaintiff would be entitled to relief, not to damages for a misrepresentation, but to an order on the Defendant as trustee for the Plaintiff to pay to him the Admiral's life interest in the fund in question, subject only to the incumbrances disclosed by the Defendant. This is not the relief sought by the Plaintiff, nor is it the relief given to him by the Court below, but it is relief to which he would be entitled on the ground of estoppel. But the difficulty of affording the Plaintiff relief on this ground arises from the ambiguity of the Defendant's letters. They are quite consistent with the view that the incumbrances mentioned by the Defendant were all he knew of or remembered. A statement, however, to that effect would not estop him from shewing that there were others which he did not know of or did not remember. But then it is said that he ought to have known of them and remembered them, as notice of them had been given to him; and it is admitted that if he had looked into the deeds and documents relating to the trust, he would have found that there were other incumbrances besides those which he did in fact know of and did accordingly mention. Knowledge and means of knowledge are very different things; and if a person truly says he only knows or remembers so and so, is it right to treat him as saying that he knows more, even if it is his duty to inform himself accurately before he speaks? I do not think that so to hold would be consistent with *Derry* v. *Peek* (2). To treat him in the case supposed as saying more than he did, would be to resuscitate the doctrine condemned in *Derry* v. *Peek*, and to hold him liable in damages for a negligent misrepresentation.

But then it is said that the Defendant's language was such as

(1) 10 Ves. 470. (2) 14 App. Cas. 337.

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to be calculated to mislead, and as in fact to mislead, the Plaintiff's solicitors, who applied to the Defendant for information; and reliance is placed on the judgment of Baron *Parke* in *Freeman* v. *Cooke* (1), and of the present Master of the Rolls in *Carr* v. *London and North-Western Railway Company* (2). But the answer to this argument is, that the Plaintiff too hastily inferred from the Defendant's letters that there were no other incumbrances besides those which he mentioned. He never said this in terms; I cannot think he meant to be so understood; and although the Plaintiff's solicitors may have so understood him, I do not think they had more reason to be satisfied with his last letter than with his first, which they saw was too loosely expressed to justify them in acting upon it. It must be remembered that in this case the Defendant was not the only trustee, and it does not appear that the Plaintiff's advisers applied to the other trustee. It is often said that notice to one trustee is notice to all: *Browne* v. *Savage* (3); but this is one of those misleading generalities against which it is necessary to be on one's guard. An incumbrancer of a trust fund who first gives notice to any of its trustees obtains priority over any prior incumbrancer who has given no notice to any of them; but notice to one does not affect the other trustees so as to make them liable for what they may do in ignorance of the notice to their co-trustee. There is no law which precludes them from saying they do not know what he knows; and notice given to one who dies or retires without communicating it to his co-trustee cannot, I apprehend, render them liable for not giving effect to a notice of which they know absolutely nothing: see on this subject, *Phipps* v. *Lovegrove* (4). The doctrine of implied notice cannot create an estoppel in such a case any more than it can create a personal liability.

Fraud, breach of duty, warranty, estoppel, being therefore all negatived in the present case, no ground remains on which this action can be supported.

The appeal, therefore, must be allowed, with costs here and below.

(1) 2 Ex. 654.
(2) Law Rep. 10 C. P. 307.
(3) 4 Drew. 635.
(4) Law Rep. 16 Eq. 80.

Bowen, L.J.:—

I am of the same opinion, and I only add one or two words because, substantially, I agree with all that my Brother the Lord Justice has said.

As to *Derry* v. *Peek* (1), I think, as we have already had reason more than once to explain, it decides two things, and two things only. First, the point of Common Law required no elaboration, namely, the point that an action for deceit or fraud, properly so-called, would only lie at law for a fraudulent misrepresentation—a fraudulent allegation that a fact existed which did not exist, in the truth of which representation the person making it had no genuine or honest belief. That was the rule at Common Law.

But *Derry* v. *Peek* decides, secondly, that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry. In *Derry* v. *Peek*, the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognises, to be careful. But *Derry* v. *Peek* leaves, as my Brother the Lord Justice has said, altogether untouched, first of all the case of warranty, which we need not consider; and secondly, cases of estoppel. But we must be guarded in the way in which we understand the remedy where there is an estoppel. Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said. An illustration of a case of that kind of estoppel filling up the gap in the evidence which, when so filled up, would produce this right to relief, is found in the case of *In re Bahia and San Francisco Railway Company* (2).

(1) 14 App. Cas. 337. (2) Law Rep. 3 Q. B. 584.

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Burrowes v. *Lock* (1) was a case of estoppel. As soon as we looked at the record it so appeared. It was a case where there was a right to relief on the hypothesis that the defendant was precluded from denying the truth of a particular fact.

Slim v. *Croucher* (2) was supposed by the Court which decided it to be on all-fours with *Burrowes* v. *Lock*; and so it would have been, I think, if an action for specific performance could have been brought in *Slim* v. *Croucher*. I confess that I agree with my learned Brother in failure to discover how an action for specific performance could have laid in that case. If it could have laid, then I think the decision in *Slim* v. *Croucher* would have been justified, because it seems to me that a person who alleges that he has undertaken to grant a lease really alleges that he has undertaken to grant a valid lease.

Therefore, we come to the conclusion in this case, that in order to entitle the Plaintiff to relief, we must find here such an estoppel as would justify a claim for relief based upon the hypothesis that the Defendant is precluded from denying the truth of the fact which he is supposed to have asserted. Now, an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed. Now, after a careful consideration of these letters, I have come to the conclusion that the Defendant did not make any clear statement of the character which the Plaintiff alleges. I think that his language would be reasonably understood as conveying an intimation of the state of his belief, without an assertion that the fact was so apart from the limitation of his own knowledge; and therefore that no relief here can be granted.

The appeal, therefore, in my opinion, must succeed.

Kay, L.J.:—

In the discussion in this case, the question was raised whether Courts of Equity have been in the habit of exercising a more

(1) 10 Ves. 470. (2) 1 D. F. & J. 518.

extensive jurisdiction than Courts of Law in cases of innocent misrepresentation.

The Plaintiff, being about to deal with an equitable tenant for life under a settlement by lending him money upon the security of his life interest, caused inquiries to be made of the Defendant, who is one of the trustees of that settlement, whether the life estate was incumbered. If the Defendant had given a positive answer that it was not incumbered, and the intending lender, relying upon that assurance, had proceeded to lend money upon a mortgage of the life interest, and had afterwards taken proceedings against the trustee to realize his security, there seems to be no doubt that the trustee could not defend himself by saying that the life estate had been previously assigned, but that when he made the statement he had forgotten that fact. Also, where there is conscious deceit, there is no doubt Equity would give relief.

In 1699, in *Draper* v. *Borlace* (1), one who had encouraged another to lend money on mortgage, concealing a prior charge of his own, was postponed.

In 1801, in *Evans* v. *Bicknell* (2), Lord *Eldon* said (3): "It is a very old head of Equity, that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false."

Knowledge of the falsehood, of course, makes the misrepresentation fraudulent, and in cases of fraud Courts of Equity have always exercised a wide jurisdiction.

The facts in *Evans* v. *Bicknell* were that one *Stansell*, having a life interest in certain real estate in remainder after the death of his wife, with a possible reversion in fee in default of children, obtained the title-deeds from *Bicknell*, one of the trustees, and, concealing the settlement, mortgaged the estate in fee to the plaintiff, who filed the bill against the trustee, alleging that he had delivered the deeds to *Stansell* for the purpose of enabling him to make the mortgage. Lord *Eldon* said (4): "The question then is, supposing the husband's interest insufficient to satisfy

(1) 2 Vern. 369.
(2) 6 Ves. 174.
(3) 6 Ves. 183.
(4) Ibid. 182.

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the mortgage, whether there is a personal demand against *Bicknell* upon the circumstances of his conduct; and whether, if there is, it can be enforced in a Court of Equity." Relief was refused because the evidence of fraud was not sufficient.

In 1805, in *Burrowes* v. *Lock* (1), a trustee was held liable to the plaintiff who had bought the interest of a *cestui que trust*, relying upon the statement of the trustee that the *cestui que trust* was entitled to the fund, the trustee having forgotten that he had received notice of a first incumbrance. The language of Sir *William Grant* seems to make it doubtful whether he entirely believed that the trustee had forgotten—if he had not, of course, his statement would be fraudulent.

But it is quite plain that fraud is not necessary in all cases as a ground for this relief.

In 1682, in *Hobbs* v. *Norton* (2), relief was given against the owner of land who answered an inquiry as to an annuity, supposed to be charged upon the land, that he believed it was so charged, and encouraged the applicant to proceed in his purchase of the annuity. The landowner was compelled to pay the annuity, though he had since discovered that he was entitled to the land free from any such charge.

In 1690, in *Hunsden* v. *Cheyney* (3), a mother, who was entitled to a term of years in land which was limited to her in tail, stood by while her son negotiated a marriage upon the footing that he was entitled to the term upon her death, and engaged to settle such reversion on the issue of the marriage. On the suit of a child of that marriage she was compelled to make the settlement good, though it was insisted that she was not guilty of any fraud or ill practice, but was ignorant that as tenant in tail she could dispose of the term.

In each of these cases the plaintiff relied either upon the fraud of the defendant or upon his being estopped from defending himself by denying the truth of his own statement.

In *Slim* v. *Croucher* (4), where a person, being asked to lend upon the security of a lease which the borrower represented that he was entitled to have granted to him, applied to the lessor

(1) 10 Ves. 470.
(2) 1 Vern. 136.
(3) 2 Vern. 149.
(4) 1 D. F. & J. 518.

and received from him an assurance that he was agreeable to grant a peppercorn lease of the property in question to the borrower. In fact, he had already granted the lease and the borrower had mortgaged it; but the lessor had forgotten the previous grant. The money having been advanced on the faith of this statement, the Court of Appeal, consisting of Lord *Campbell*, L.C., and *Knight Bruce* and *Turner*, L.JJ., directed the lessor to repay the money advanced, with interest and costs of suit, recognising in distinct terms that there was no moral fraud on the part of the lessor.

That case carries the doctrine as far as any that can be cited, because at that time Courts of Equity were not accustomed to give relief by way of damages in cases which did not involve actual fraud. Lord *Campbell* said, however, that it belonged to a class of cases over which Courts of Law and Courts of Equity had a common jurisdiction; and the relief was granted on the authority of the *dicta* of Lord *Eldon* in *Evans* v. *Bicknell* (1), and upon the ground that the plaintiff was to be placed as far as possible in the position he was in before the representation was made. According to the recent decision in the House of Lords in *Derry* v. *Peek* (2), an action of deceit could not have been maintained under such circumstances, because there was not actual fraud. The doctrine of estoppel seems scarcely applicable. The representation relied on in *Slim* v. *Croucher* (3) was more like a contract or promise than the statement of an existing fact. The lessor said he was agreeable to grant the lease. But as the money was not advanced at the lessor's request, there seems to have been no consideration to support a contract. However, the language used by the lessor involved a representation that he was in a position to grant the lease, and this may have been the misrepresentation relied on. If the mortgagee could sue the landlord to compel him to grant the lease or, in the alternative, for damages, and the landlord were estopped from denying his ability to make the grant, he might be treated as contumaciously refusing to do so, and in this way perhaps the decision might be justified. But this would be an action for specific performance

(1) 6 Ves. 174. (2) 14 App. Cas. 337.
(3) 1 D. F. & J. 518.

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of a contract, and I do not see how it could be maintained. Lord Justice *Turner* says distinctly that enforcing a personal demand against the Defendant under such circumstances is an old jurisdiction of the Court of Equity, and refers to Lord *Eldon's* language in *Evans* v. *Bicknell* (1), which, however, as I have pointed out, was a case of fraud. Lord *Campbell* evidently felt the difficulty, for in his judgment he seems to distinguish the case from an action for damages, because there could be no question about the amount to be recovered.

In *Piggott* v. *Stratton* (2), a vendor induced a man to buy land for building by a statement that he was lessee of the adjoining land, and could not, owing to the terms of his lease, build upon it so as to obstruct the sea-view from the land he was selling. After the plaintiff had built, the vendor surrendered his lease and took a new one not containing any restriction against obstructing the view, and then commenced to build so as to obstruct the view from the plaintiff's houses. It was held by the same Court that decided *Slim* v. *Croucher* (3) that the vendor must be restrained from so doing, Lord *Campbell*, C.J., sustaining the injunction expressly on the ground of estoppel. "I apprehend," he says (4) "that the injunction is to be supported on the well-established doctrine, that if *A.* deliberately makes an assertion to *B.*, intending it to be acted upon by *B.*, and it is acted upon by *B.*, *A.* is estopped from saying that it was not true. If it turns out to be false, *A.* is answerable for the damage which may have accrued to *B.* from having acted upon it, and *B.* is entitled, in respect of anything done in the belief that it was true, to object to any denial of its truth by *A.* This doctrine is to be found in *Pickard* v. *Sears* (5), and a series of subsequent decisions."

Lord *Campbell's* language in both these cases, but more especially in the former, might be read as intimating an opinion that an action at law would lie for an innocent misrepresentation of fact upon which another person acted. But *Piggott* v. *Stratton* was an obvious case of estoppel.

(1) 6 Ves. 182.
(2) 1 D. F. & J. 33.
(3) 1 D. F. & J. 518.
(4) Ibid. 49.
(5) 6 Ad. & E. 469.

It has been recognised since *Freeman* v. *Cooke* (1) that a statement made by a man with the intention that it should be acted upon, and which is acted upon accordingly, is binding upon him, so that he is precluded from contesting its truth although it was not fraudulently made, and this has been followed in numerous instances. The doctrine was stated by Lord *Blackburn* in the House of Lords, in the well-known case of *Burkinshaw* v. *Nicolls* (2) in these words: "When a person makes to another the representation 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Certificates in that case had been issued by a joint stock company for shares which the certificates stated had been fully paid up, and the company were held to be estopped from denying that they were paid up, as against a purchaser of those shares for value without notice. The same doctrine was applied in *In re Bahia and San Francisco Railway Company* (3) and in *Hart* v. *Frontino and Bolivia South American Gold Mining Company* (4), where no kind of fraud was imputed to the companies.

The result of the authorities seems to be as follows:—

1. There has been from ancient time a jurisdiction in Courts of Equity in certain cases to enforce a personal demand against one who made an untrue representation upon which he knew that the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting.

2. This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law.

3. Relief will also be given at Law and in Equity, even though the representation was innocently made without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation.

(1) 2 Ex. 654.
(2) 3 App. Cas. 1004, 1026.
(3) Law Rep. 3 Q. B. 584.
(4) Ibid. 5 Ex. 111.

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4. Where there is no estoppel, an innocent misrepresentation will not support an action at law for damages occasioned thereby.

5. Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact alleged: for example, if an assign of *A.* sues *A.*'s trustee to recover the fund assigned, and the trustee is prevented from denying its existence in his hands; or at law, if the assign of a debt should sue the alleged debtor and he was prevented from denying that the debt was due. Or, in the converse case, an estoppel may be a defence; as if a joint stock company were to sue a shareholder for calls and they were estopped from denying that the shares were paid up, their action would fail.

It is obvious that this rule does not apply to an action for deceit. In such an action the plaintiff relies, not on the truth of the statement, but upon its falsehood; and he is bound to prove, not only that the representation was untrue, but also that it was made fraudulently. *Derry* v. *Peek* (1) very well illustrates the difference. It was an action by a person who had been induced to take shares in a joint stock company by an untrue statement in a prospectus. The action was not against the company, but against the directors who had issued the prospectus. The representation was not fraudulently made. Preventing the defendants from denying the truth of their representation would not enable the plaintiff to succeed in such an action; so that the plaintiff could not rely on estoppel. That could only be if the defence had been that the statement was inaccurate, and the defendants were estopped from denying the accuracy of their own statement. The plaintiff's case was not that the statement must be treated as accurate: on that supposition he could not have had any relief against the defendants. The plaintiff sued the defendants upon the ground that the statement was false, and false to their knowledge—that is, fraudulent; and the defence that prevailed was that, if it was inaccurate, it was not fraudulent.

6. I am not satisfied that relief in the nature of a personal demand against the defendant has been given in Equity in cases

(1) 14 App. Cas. 337.

which did not involve fraud or to which this doctrine of estoppel would not apply. *Slim* v. *Croucher* (1) is the only instance I know of; and, as Lord *Campbell* said that there might be relief at law in that case, he probably considered, either that it was a case of estoppel, or that an action of deceit would lie—which latter view is not consistent with *Derry* v. *Peek* (2).

In the present case the doctrine of estoppel would enable the Plaintiff to succeed if the facts warrant the application of it. But in order to create an estoppel, the statement by which the Defendant is held bound must be clear and unambiguous. This is an ancient rule as to estoppel by statements in a deed, as appears from *Rolle's* Abr.: "Estoppel" ((P) pl. 1 and 7), and was acted on by Lord *Cairns* in *Heath* v. *Crealock* (3). In *General Finance, Mortgage, and Discount Company* v. *Liberator Permanent Benefit Building Society* (4), Sir *G. Jessel* followed the last case, and intimated that, in his opinion, the doctrine ought not to be extended, there being no reason for preferring one innocent purchaser to another. That certainty of statement is also required to maintain an estoppel upon a statement not by deed, appears from *Freeman* v. *Cooke* (5), where relief was refused upon the ground that no reasonable man would have acted on the faith of the statements made if they were taken altogether.

Whether this suit be treated as in Equity or at Law, the essence of the Plaintiff's case must be that he was misled by the statement. The Court must be satisfied of this. If there was fraud, and the statement was intended to mislead, its ambiguity would not be a defence; but where no fraud is alleged, it is essential to shew that the statement was of such a nature that it would have misled any reasonable man, and that the Plaintiff was in fact misled by it.

One peculiarity of the present case is that there is no evidence. The cause is tried upon admissions by both sides Consequently we have no statement by the Plaintiff or by his professional advisers, who were the real actors in the negotiations, as to what meaning they attributed to the letters on which they now rely

(1) 1 D. F. & J. 518.
(2) 14 App. Cas. 337.
(3) Law Rep. 10 Ch. 22.
(4) 10 Ch. D. 15; 27 W. R. 210.
(5) 2 Ex. 654.

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as a misrepresentation; nor is there any statement or admission as to the extent of the reliance which they placed upon the alleged misrepresentation. The Court has to determine what the representation amounted to, and how far it influenced the Plaintiff's conduct. The Plaintiff did not personally interfere in the negotiations. His solicitors having been applied to by Vice-Admiral *Bouverie*, the equitable tenant for life, for a loan upon the security of his life interest, and having, as appears from the first letter, been assured by him that he had not mortgaged or in any way parted with such life interest, wrote the letters which have already been read by Lord Justice *Lindley*.

It was pointed out by Lord Justice *Bowen* in the argument, that the last letter but one demonstrated that the writers, the Plaintiff's solicitors, considered they had not obtained at that time a satisfactory answer to the question stated in it. The reply was on the 27th of February. Without further inquiry the Plaintiff lent money to Vice-Admiral *Bouverie* upon the security of a mortgage of his life interest, and the Plaintiff admits that the Defendant did not, at the time of his correspondence, recollect that he had received, as he now admits was the fact, notice of, or that he was otherwise aware of, the existence of previous mortgages on the life estate. It appears that nothing can be recovered from the tenant for life, who is an undischarged bankrupt, and is out of the jurisdiction.

Now, what is the true inference from these facts? Did this correspondence amount to a statement by the Defendant that there were no other incumbrances upon the life estate than those mentioned in his letters? Or was the true meaning that those were all that he knew of or remembered at the time?

It is said that we should adopt the former view, because otherwise it is not probable that the money would have been advanced; but I am not convinced of that.

The Plaintiff's solicitor had the assurance of Vice-Admiral *Bouverie* that he had not incumbered, and they might well have been satisfied with the statement of the trustee in addition that he did not know of any incumbrance. Such a statement made in good faith, if accurate, would not render the Defendant liable.

I am strongly disinclined, in a case which is free from any

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suspicion of fraud, to hold a person in the position of this Defendant liable upon a statement which is not clear and unambiguous. I cannot believe that solicitors receiving such letters as those written by this Defendant could possibly read them as a positive assurance that there were no other incumbrances. I think that the only fair meaning which they could attribute to the statements of the Defendant was that the charges he mentioned were all that he was aware of at the time he was writing.

For this reason, I think that the appeal should be allowed and the action dismissed.

Solicitors: *Pearce-Jones & Co.; Tylee & Co.*

G. I. F. C.

AVERY *v.* WOOD.

C. A. 1891 July 1.

[1889 A. 796.]

Costs—"Full Costs"—Copyright—5 & 6 Vict. c. 45, s. 26 [Revised Ed. Statutes vol. viii. p. 1160]—5 & 6 Vict. c. 97, s. 2 [Revised Ed. Statutes, vol. viii. p. 1312].

Where an action for alleged infringement of copyright is dismissed with "full costs," according to 5 & 6 Vict. c. 45, s. 26, the costs are to be taxed in the ordinary way as between party and party.

The Act 5 & 6 Vict. c. 97, s. 2, which enacts that where by any public Act it is provided that "either double or treble costs or any other than the usual costs between party and party" shall or may be recovered, the party theretofore entitled to such double, treble or other costs shall instead thereof receive such full and reasonable indemnity as to costs as shall be taxed by the proper officer, does not apply, inasmuch as "full costs" are not costs other than the usual costs as between party and party.

Decision of *North*, J., affirmed.

THIS was an action to restrain an alleged infringement of copyright and for damages. At the trial Mr. Justice *Romer* dismissed the action "with full costs to be taxed by the Taxing-Master," following the language of 5 & 6 Vict. c. 45, s. 26.

The Defendants carried in their bill for taxation. The Taxing Master at first thought that it ought to be taxed as between solicitor and client, and commenced the taxation on that footing; but an adjournment having taken place, he investigated the

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matter further, and came to the conclusion that he was bound by *Jamieson* v. *Trevelyan* (1) to tax the costs as between party and party, which he accordingly did.

The Defendants carried in an objection to the disallowance of a number of the items, on the ground that the costs ought to have been taxed as between solicitor and client, contending that the meaning of the term "full costs" in the order and in 5 & 6 Vict. c. 45, s. 26, was that the Defendants should be fully indemnified against the costs incurred by them in resisting a claim to copyright which failed.

The Taxing Master answered: "This bill was taxed as between party and party on the authority of *Jamieson* v. *Trevelyan* (1855), the most recent case I have been able to find as to the meaning of 'full costs,' which words were thereby decided to mean 'ordinary costs as between party and party.' And by *Irwine* v. *Reddish* (1822) (2) it was decided that there was no distinction in law between 'costs' and 'full costs.' In *Doe* v. *Mayor of Manchester* (1852) (3), a wider interpretation was put upon the words, which were held to mean a complete indemnity; but that was under 8 & 9 Vict. c. 18, and even if it were an authority for construing the words 'full costs' under any other statute it must be held to have been overruled by *Jamieson* v. *Trevelyan*. The claim to full costs in the present case arises under 5 & 6 Vict. c. 45, s. 26, which gives 'full costs' under the circumstances of such a case as this. It is to be observed, however, that sect. 10 of the same Act gives costs in certain other instances as between solicitor and client, which it may be supposed would have been the words used in sect. 26 had it been intended thereby to give more than party and party costs."

The Defendants applied to vary the certificate. The application was refused by Mr. Justice *North* in chambers. The Defendants appealed.

A. Hopkinson, for the appeal:—

The question is whether "full costs" means ordinary costs as between solicitor and client, or costs which will be a com-

(1) 10 Ex. 748. (2) 5 B. & Al. 796.
(3) 12 C. B. 474.

plete indemnity. The decision under appeal gives the expression the first meaning. This makes the word "full" in 5 & 6 Vict. c. 45, c. 26, mere surplusage. "Full costs" must denote something more than ordinary costs, or the word "full" would not have been inserted. Sect. 10 of the same Act in fact interprets the phrase as meaning costs as between solicitor and client. The policy of the statutes granting monopolies has been to give something extra in the way of costs to persons wrongfully sued by the monopolist. 8 Anne, c. 19, s. 8, as to copyright, is in the same terms as 5 & 6 Vict. c. 45, s. 26. So are 15 Geo. 3, c. 53, s. 7, and 41 Geo. 3, c. 107, s. 8. The Act 54 Geo. 3, c. 156, s. 5, similarly gives "full costs." The Acts as to engravings, 8 Geo. 2, c. 13, s. 3, and 7 Geo. 3, c. 38, contain the same provision as 8 Anne, c. 19. The statute as to sculpture, 54 Geo. 3, c. 56, s. 3, gives "double costs of suit"; and the Act as to dramatic property, 3 & 4 Will. 4, c. 15, s. 2, gives "double costs of suit" to a successful plaintiff. The statute 5 & 6 Vict. c. 97, s. 2, provides that under any public Act which gives double or treble costs "or any other than the usual costs between party and party," the party entitled to the costs shall receive such full and reasonable indemnity as to all costs incurred about the action as shall be taxed by the proper officer. We come within this, for "full costs" must be costs other than the usual costs between party and party. There are only three cases bearing on the subject: *Jamieson* v. *Trevelyan* (1), *Irwine* v. *Reddish* (2), and *Doe* v. *Mayor of Manchester* (3), the last of which is in my favour, and I ask the Court to decide in the same way.

Spokes, for the Plaintiff, was not called upon.

LINDLEY, L.J.:—

The Taxing Master in this case was directed to give the Defendant "full costs," in accordance with the *Copyright Act* (5 & 6 Vict. c. 45, s. 26), and the question is what was meant by "full costs." If the matter were *res nova*, there would be much to be said in favour of Mr. *Hopkinson's* contention. But it was

(1) 10 Ex. 748.

(2) 5 B. & Al. 796.

(3) 12 C. B. 474.

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decided so long ago as 1822, in *Irwine* v. *Reddish* (1), that "full costs" meant no more than ordinary costs between party and party, and the same view was taken in *Jamieson* v. *Trevelyan* (2). The expression "full costs" was used in 8 Anne, c. 19, and in subsequent Acts relating to copyright, and there is no decision which opposes *Irwine* v. *Reddish*. I cannot consider that the 10th section of 5 & 6 Vict. c. 45, which gives certain costs as between solicitor and client, can be taken as construing the expression "full costs" in the 26th section, which is in the same terms as a section occurring in 8 Anne, c. 19, and in several subsequent *Copyright Acts*. It appears to me that the matter is settled by authority, and that the Taxing Master was right.

FRY, L.J.:—

I am of the same opinion. This question received a judicial determination in 1822, when the Court in *Irwine* v. *Reddish* held that there was no difference between "full costs" and ordinary costs as between party and party. There is no decision the other way, and there can be no doubt that the practice followed that decision. The Legislature in 1842 must be taken to have used the words with knowledge of the judicial interpretation which had been put on them, and to have intended to use them in the sense thus given to them. The argument on 5 & 6 Vict. c. 97, s. 2, proceeds on the assumption that "full costs" means something more than ordinary costs between party and party, but it had long ago been determined that they mean the same thing.

Solicitors: *Morten, Cutler & Co.; Radford & Frankland.*

(1) 5 B. & Al. 796. (2) 10 Ex. 748.

H. C. J.

In re JANE DAVIS.
In re T. H. DAVIS.
EVANS *v.* MOORE.

C. A.
1891
July 15.

[1891 D. 98.]

Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8 [*Revised Ed. Statutes, vol. xvii., p.* 253]—*Suit to recover Legacy—Express Trust—Implied Trust.*

A suit to recover a legacy from an executor is within the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), s. 8, unless the legacy is vested in him on express trusts. A mere constructive trust will not prevent the statute from being a bar.

A testatrix bequeathed a share of her residuary estate to two of her grandchildren, and declared that their father should from time to time regulate and direct the mode in which, during their minority, the shares bequeathed to them should be invested, applied, or accumulated, and that neither he nor the executor should be answerable for any loss on the investments. Part of the residuary estate of the testatrix consisted of a share of income which was released from accumulation by the *Thellusson Act*. By an order in an old suit this share of income was ordered to be paid to the executor of the testatrix as her legal personal representative, and he received it down to his death in 1888, a period of more than thirty years. In 1891 the grandchildren sued his executor for an account of this income:—

Held (varying an order of *North*, J.), that the account must be limited to sums received within twelve years before the commencement of the proceedings of 1891, for that neither under the will of the testatrix nor under the order did the executor hold the moneys upon an express trust.

JANE DAVIS, widow, by will dated the 13th of May, 1848, disposed of her residuary estate as follows:—

"Subject to the payment of my debts and funeral and testamentary expenses, I give and bequeath all my moneys and securities for money, and other my personal estate whatsoever not hereinbefore specifically bequeathed, in manner following—(that is to say), as to one third part thereof, to my eldest son, *Thomas Henry Davis*, absolutely; as to one other third part thereof, to my second and only other surviving son and child, the said *Gilbert W. W. Davis*, absolutely; and as to the remaining third part thereof, unto and equally between my two grandchildren, *Henry A. M. Evans* and *Mary V. M. Evans* (the son and

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daughter of my son-in-law, *John Evans*, Q.C.), absolutely, share and share alike."

If either grandchild died under twenty-one without leaving issue, his or her share was given over to the survivor; and if both died under twenty-one without leaving issue, the third share was given over to the testatrix's sons equally.

"And I hereby declare my will to be that my said son-in-law, *John Evans*, shall from time to time regulate and direct the mode in which, during the minority of my said grandchildren, the shares hereinbefore bequeathed to them of my residuary personal estate, and the income arising therefrom, shall be invested, applied, or accumulated, and that neither he nor my executor hereinafter named shall be answerable or accountable for any loss which may arise on the investments. And I appoint my said son, *T. H. Davis*, sole executor of this my will."

The testatrix died on the 4th of January, 1854, and her will was proved by *T. H. Davis*.

By an order of the 20th of July, 1857, made in a suit of *Davis* v. *Stokes*, in which a decree had been made for the administration of the estate of *Henry Davis*, the husband of the testatrix, who had made a will directing an accumulation beyond the period allowed by the *Thellusson Act*, it was declared that *Jane Davis* and the five persons therein named (the five children of the testator who survived him) as the parties who would at the testator's decease have been entitled to his personal estate if he had died intestate, or their respective estates, were entitled to the income of the testator's residuary estate which had accrued since the 16th of May, 1846, when the period of twenty-one years from the testator's death expired, and to the income to accrue due on the residuary estate until the period of distribution. It was ordered that one third part of the proceeds of the sale of certain sums of stock, representing accumulations made since the 16th of May, 1846, should be paid to "the said *T. H. Davis*, as the legal personal representative of the said *Jane Davis*, widow, deceased," and that the future dividends on the funds in Court, representing the testator's estate, should, until further order, be paid—"one equal third part thereof to the said *T. H. Davis*, as the legal personal representative of the said *Jane Davis*,

widow, deceased," and one equal fifth part of the remaining two-thirds to each of the five persons therein named, being children or personal representatives of children of the testator.

Thomas Henry Davis died on the 21st of July, 1888. The Defendant was his only executor who proved.

On the 15th of January, 1891, the two *Evanses* took out an originating summons asking a declaration that *T. H. Davis* was, and that his estate now is, liable to account for and make good to the Plaintiffs one third part of the income received by him as the legal personal representative of *Jane Davis*, under the order of the 20th of July, 1857, and for consequential relief.

It appeared that *Thomas Henry Davis*, as executor of *Jane Davis*, received under the order of the 20th of July, 1857, upwards of £200 a year, and such receipt was continued to his death.

On the 20th of April, 1891, Mr. Justice *North*, in Chambers, made an order directing an account of the dividends, interest, and income received by *T. H. Davis*, as executor of *Jane Davis* under the order of the 20th of July, 1857, and by the Defendant as executor of the will of *T. H. Davis* since his death, and an inquiry in what manner *T. H. Davis* and the Defendant applied such dividends, interest, and income.

The Defendant appealed, asking that the account might be confined to income received within twelve years prior to the 15th of January, 1891, the date of the commencement of the action.

Haldane, Q.C., and *Pauli*, for the appeal:—

We do not dispute that an account must be taken, but we say it ought to be limited to twelve years, for that there is no trust in the case.

[FRY, L.J.:—A sum is paid out to an executor which belongs to a legatee,—Is the executor a trustee of it?]

No, unless there is something more in the case; otherwise an executor would in every case be a trustee of the residue, which he generally is not: *In re Rowe* (1). The *Statute of Limitations* distinguishes legacies and trusts.

(1) 58 L. J. (Ch.) 703.

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[LOPES, L.J., referred to *Phillipo* v. *Munnings* (1) and *O'Reilly* v. *Walsh* (2).]

Phillipo v. *Munnings* went on the ground that the legacy was bequeathed to the executor on trusts, and that he had severed it from the property and held it on those trusts, so that the suit was not one against an executor to recover a legacy, but against a trustee to make him replace a trust fund. *O'Reilly* v. *Walsh* is similar; the executor had to invest the legacy, and when he had assented to it and invested he became an express trustee. This case is quite different. Payments over of subsequent assets coming in do not revive the right to a general account: *In re Johnson* (3). By the *Judicature Act*, 1873, s. 25, sub-s. 2, no claim of a *cestui que trust* against his trustee in respect of property held in an express trust is to be held barred by any Statute of Limitations; but in order to make that rule apply you must have the character of trustee as distinguished from that of executor, and the trust must be express.

Cozens-Hardy, Q.C., and *B. B. Rogers*, for the Respondent:—

We contend that the will created an express trust of the residue, and we rely on *O'Reilly* v. *Walsh*. This is an express trust within the principle of that case.

[LINDLEY, L.J.:—A trust may be necessarily implied; but can you say that it is express?]

Suppose it is not, we are not under the section relating to land which requires a trust to be "express." As to personalty, the only question in equity is whether the relation of trustee and *cestui que trust* is created. We sue for this as a trust fund—not as a legacy. The will imposed on the executor the duty to invest; he had indeed to obey the directions of the father of the legatees as to investment; but the investment was to be made by the executor, and as soon as he received the money he was a trustee of it. If *T. H. Davis* was not a trustee under the will he was so under the order of the 20th of July, 1857.

(1) 2 My. & Cr. 309. (2) I. R. 6 Eq. 555.
(3) 29 Ch. D. 964, 974.

Haldane, in reply :—

No intention is indicated on the face of the will that the infants' share of residue should be invested in the name of the executor. During the father's life they were to be invested as the father directed, and if the father died there is nothing to shew that the testatrix intended anything else than that the executors should discharge themselves in the way in which executors by law can discharge themselves in the case of infants' legacies.

LINDLEY, L.J. :—

The question here is whether the account directed against the Defendant ought to be left open, or limited to a period of twelve years before the commencement of the action. The Defendant is the executor of an executor, and the question is as to the liability of the estate of his immediate testator. The Plaintiffs claim sums of money which they say that *T. H. Davis,* the Defendant's testator, received as executor of their grandmother, *Jane Davis,* and ought to account for. Part of the residuary estate of *Jane Davis* consisted of a third share in the income of her husband's estate which under the *Thellusson Act* had become undisposed of, and by an order made in 1857 in a suit for the administration of that estate, it was ordered that until further order one-third of the income of the husband's estate should be paid to *T. H. Davis* as legal personal representative of *Jane Davis.*

Jane Davis had by her will bequeathed her residuary personal estate as to one-third to her son *T. H. Davis,* as to one-third to another son, and as to the remaining third to the Plaintiffs, the two children of *John Evans* (who were then minors) absolutely, share and share alike. She proceeded to say: "And I hereby declare my will to be that my said son-in-law, *John Evans,* shall from time to time regulate and direct the mode in which during the minority of my said grandchildren the shares hereinbefore bequeathed to them of my residuary personal estate and the income arising therefrom shall be invested, applied, or accumulated, and that neither he nor my executor hereinafter named shall be answerable or accountable for any loss which may arise

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on the investments. And I appoint my son *T. H. Davis* sole executor of this my will." There is no clause which expressly and in terms directs these shares to be invested. The clause I have read confers on the father of the Plaintiffs a power to regulate the investment, and provides that neither he nor the executor shall be liable for any loss which may arise on the investments. Mr. *Cozens-Hardy* contends that this creates an express trust to invest; but I think Mr. *Haldane's* view correct, that no duty is imposed on the executor to invest, but only a power to invest in manner directed by the father of the Plaintiffs. Suppose no direction to be given by the father, what is the executor to do? It appears to me that he might pay the sum into Court under the *Legacy Duty Act* or under the *Trustee Relief Act.*

What then is the nature of the present claim? Can the Plaintiffs claim anything more than a legacy under their grandmother's will? I think not. If that be so the case comes under 37 & 38 Vict. c. 57, s. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured . . . , or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same . . ." If the present proceeding is a suit for a legacy Mr. *Haldane* is right in his contention that there should be a limit of twelve years. In opposition to this it is said that *T. H. Davis* was not only an executor but a trustee, if not under the will then under the order of 1857, for that he was the only person who could receive the third share of income under it, and that he held it in trust for the Plaintiffs. The *Statute of Limitations* excepts only express trusts, and there is no more an express trust under that order than under the will. A legacy does not cease to be a legacy because it is subject to some implied trusts. An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own, but such a trust does not take a case out of the statute. An executor cannot be deprived of the benefit of the statute by shewing that he is a trustee; it is necessary to make out that he is an express trustee. The account, therefore, must be limited to twelve years before the 15th of January, 1891.

Fry, L.J.:—

The Plaintiffs are suing the executor of the executor of the grandmother to recover one-third of moneys which form part of her residuary estate. *Primâ facie* such a claim is barred by the statute as being a proceeding to recover a legacy. But Mr. *Cozens-Hardy* says that the grandmother's executor held these moneys on express trust. The testatrix directs that "*John Evans* shall from time to time regulate and direct the mode in which during the minority of my said grandchildren the shares hereinbefore bequeathed to them of my residuary personal estate, and the income arising therefrom, shall be invested, applied, or accumulated,"—I pause there to observe that investment is only one of three ways in which the testatrix contemplates the shares being dealt with; there is no direction for investment alone. She then proceeds: "And that neither he nor my executor hereinafter named shall be answerable or accountable for any loss which may arise on the investments." This applies in case an investment is made; but there is no direction that the shares shall be invested at all unless *John Evans* directs it, and it is not shewn that any such direction has been given. We have then only the ordinary case of a legacy to an infant with no express trust.

Is there then any implied trust under the order of the 20th of July, 1857? I do not give any opinion on that point, as I consider it immaterial, for I am of opinion that the existence of an implied trust would not prevent this from being a suit to recover a legacy and so falling within the statute.

Lopes, L.J.:—

I agree with the judgments which have been delivered. I doubt whether there was here any trust, express or implied. It seems to me the better view that the executor held the money simply as executor.

Solicitors: *Wilde, Berger, & Moore; Clayton, Sons, & Fargus.*

H. C. J.

CHITTY, J.

1891

June 10, 13.

G—— *v.* L——.

[1891 G. 330.]

Practice—Ward of Court—Custody—Enforcement of Order—Serjeant-at-Arms —Tipstaff—Proper Officer—Form of Order.

Notwithstanding the changes made by the *Judicature Acts*, there still is such an officer as the "Serjeant-at-Arms attending the Court," and he is the proper officer to execute and enforce all orders for the production or custody of a ward of Court.

Motion.

The action of *G—— v. L——* was instituted for the purpose of making an infant, a boy of ten years of age, a ward of Court. The infant, by his father as next friend, and the father, were Plaintiffs. The infant's father and mother were separated, and by the terms of the separation deed the infant was to spend a part of his vacation with his mother; at the end of the vacation the mother declined to give up the custody of the infant, on the ground that the school selected by the father, with the approval of the judge, was unsuited to his health. By an order of the 1st of June, 1891, made in the action, the mother was directed to deliver the infant up to the father's nominee, on a certain day, and at a time and place specified in the said order. This order was duly served on the mother, but was not complied with. The father being unwilling to proceed by attachment or committal against his wife, now applied for an order directing the Serjeant-at-Arms attending the Court, or other the proper officer, to go and take the infant into his custody, and deliver him to the person named in the order of the 1st of June.

S. Dickinson, for the motion :—

An order similar to the one now asked for was made in *Todd* v. *Todd*, referred to in Seton on Decrees (1), but this was before the *Judicature Act*, 1875. Owing to the changes made by the Judicature Acts, there appears to be some doubt whether there still is such an officer as the "Serjeant-at-Arms attending the Court."

(1) 4th Ed. p. 754.

It has been suggested that the Tipstaff is now the proper officer to execute orders enforcing the custody or production of a ward of Court. I submit that in any case it is not necessary to have the infant produced in Court, merely to be handed over to its father's nominee, and also that my application is rightly made *ex parte*.

CHITTY, J., said inquiry should be made at the House of Lords whether there was any official who still considered himself "Serjeant-at-Arms attending the Court," and directed the matter to be mentioned again.

June 13. *S. Dickinson* renewed his application.

CHITTY, J. (after stating the facts, continued):—

The father now asks for the further assistance of the Court to obtain delivery of the boy. He might, as is obvious, have proceeded for an order of attachment or committal against the mother, an order which would have resulted in her being arrested and committed to prison. But he desires, if possible, to avoid obtaining such an order against his wife, and, therefore, he asks on the present occasion for an order directed to the Serjeant-at-Arms attending this Court, for the purpose of obtaining delivery of the boy. This is the right form of order, as has been held in previous cases for obtaining the custody of the person of a ward of Court.

When the matter was first mentioned to me, I thought it desirable that inquiry should be made to ascertain whether, having regard to recent changes, there was still such an officer as "the Serjeant-at-Arms attending the Court." Communication was made, at my direction, by the Registrar with the Lord Chancellor's Office, and I have a letter from the Permanent Secretary whereby I am informed that there is still such a Serjeant-at-Arms. There are, as is shewn from the very excellent Report which the late Master *Jenkins*, who was learned in these matters, made to me in the year 1882, other Serjeants-at-Arms (1). It

(1) "As to the office of Serjeant-at-Arms.

"The office was originally to attend the King's person, to arrest persons of condition offending, and give attendance on the Lord High Steward of

CHITTY, J. 1891 G—— v. L——.

is not necessary to state in detail in this judgment the result of his historical researches. I am satisfied that there is such an officer at the present time. It appears that in 1873, which was before the *Judicature Acts*, and again in 1879, which was subsequent to the *Judicature Acts*, such an order as is now asked was made and executed. I am informed by the Permanent Secretary that if the order is made, the Lord Chancellor will countersign it according to precedent, and that the officer will act upon it and execute it.

The result is that I make the order, and I make it *ex parte*. It is not necessary in these circumstances that there should be any further notice given to the mother. It may be, from what

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England sitting in judgment on traitors, &c. There might not be above thirty in the realm—two, by the King's allowance, to attend upon the Houses of Parliament, another on the Lord Chancellor in Chancery, one on the Lord Treasurer, and another on the Lord Mayor. They had larger powers of arrest than any other officer.

"The Serjeant-at-Arms to the Lord Chancellor and the House of Lords are two distinct duties, but they are always held by the same person.

"The Lord Chancellor's Serjeant-at-Arms had, and still has, a deputy, but the messenger attending the Court is sometimes erroneously called the deputy of the Serjeant-at-Arms. The messenger was a different officer from deputy Serjeant-at-Arms, and was properly merely a carrier of messages or pursuivant to the Great Seal; but it was formerly the practice to make commitments to messengers for the purpose (only) of carrying the parties to gaol (see *Jacob's* Law Dic., and see evidence of Mr. *Peacock* before the Chancery Commission 1824). The office of Lord Chancellor's messenger and pursuivant is now abolished (1874), and his duties as to arrest are performed by Tipstaff; the fees of Serjeant-at-Arms were double those of a messenger.

"As to Tipstaff.

"He was an officer appointed originally, by the Marshal of the *Queen's Bench Prison*, for the Common Law Courts, and by the Marshal of the *Fleet*, for the Lord Chancellor (they are now, sect. 10 of 25 & 26 Vict. c. 104, appointed by the Chief Justice and Lord Chancellor), to act in the Courts of Law and Equity.

"By 5 & 6 Vict, c. 22, the *Queen's Bench Prison* is to be called the *Queen's Prison*, and to be the only prison for bankrupts, debtors, and others theretofore imprisoned in the abolished or merged prisons, and the *Fleet* and *Marshalsea*, were abolished by the 25 & 26 Vict. c. 104, 'in consequence of the alterations in the law as to bankruptcy and imprisonment for debt,' &c. *Queen's Prison* was abolished, and *Whitecross Street* substituted, and now (by order of Home Secretary under last Act), *Holloway Prison* is substituted for *Whitecross Street*.

"*Holloway* is only for prisoners arrested by the Sheriffs of *London* or *Middlesex*, or committed for contempt."

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has been stated to me in Court, that the actual execution of the order will not become necessary. The lady may now, after all, think fit to deliver the child, without the intervention of the officer of the Court. The order may go in the form asked. In this case it is quite unnecessary to have the boy brought into Court, and then turned over to the custody of the father or his nominee.

The order will be to the "Serjeant-at-Arms attending the Court" to take the said infant into his custody, and deliver him to the lady who has been already appointed by the father to receive him, in the manner that Mr. *Dickinson* asks at the Bar.

Solicitors: *Janson, Cobb, Pearson & Co.*

W. C. D.

In re ROBINSON'S SETTLEMENT TRUSTS.

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1891
June 13.

Minerals—Settled Estate—Minerals required for support of Railway—Compensation Moneys—Capital or Income—Apportionment—Tenant for Life—Remainderman—Lands Clauses Consolidation Act, 1845, *s.* 69 [*Revised Ed. Statutes, vol. ix., p.* 642].

No apportionment can be directed under sect. 69 of the *Lands Clauses Consolidation Act*, 1845, and a tenant for life, without impeachment of waste, is not entitled to any part of the compensation money paid by a railway company under this Act in respect of minerals under the settled estate, though the whole of such minerals could probably have been worked out during his lifetime, and though a portion of them would, as a fact, have been worked out during the five years which elapsed between the notice of intention to work, and the actual sale to the railway company.

In re Barrington (1) discussed and distinguished.

THIS was a petition by the Rev. Sir *Frederick Laud Robinson*, tenant for life without impeachment of waste of a settled estate in the county of *Northampton*, for the payment out to him of a sum of £1519 7*s.* 8*d.*, compensation money paid into court by the *Midland Railway Company*, in respect of minerals under or adjacent to so much of the railway as ran through the settled estate. The facts were as follows:—

In 1865, the *Kettering, Thrapston, and Huntingdon Railway*

(1) 33 Ch. D. 523.

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purchased, under their special Act, from the Petitioner's predecessor in title, certain portions of the settled estate, which were conveyed to the railway company, their successors and assigns; the conveyance, however, contained no special reference to mines or minerals.

In January, 1886, the Petitioner, being then tenant for life, without impeachment of waste, of the said settled estate, gave notice to the railway company, under sect. 78 of the *Railways Clauses Consolidation Act*, 1845, of his intention to work the minerals under or adjoining the railway. The *bona fides* of this notice, and the right of the Petitioner to give it, was contested by the *Midland Railway Company*, who were then working the *Kettering, Thrapston, and Huntingdon Railway* (see *Midland Railway Company* v. *Robinson* (1)), and the litigation continued till December, 1889, when the *bona fides*, and right of the Petitioner to give such a notice, was finally established by the House of Lords (2). The Petitioner and the *Midland Railway Company* then came to an agreement for the sale of the minerals, under which the compensation money was ascertained by two surveyors at £1519 7*s.* 8*d.*, pursuant to sect. 9 of the *Lands Clauses Consolidation Act*, 1845. This amount was paid into Court on the 7th of May, 1891, and a conveyance of the minerals to the *Midland Railway Company* was executed by the Petitioner, as tenant for life, under the statutory powers of the *Lands Clauses Consolidation Act*, 1845, sect. 7.

The minerals under or adjacent to the railway consisted of beds of ironstone and limestone, at depths varying from six to thirty-six feet, capable of being worked, according to the custom of the district, by open or surface operations. The evidence of the two surveyors who settled the compensation money was, that a portion of the ironstone, valued at £687 19*s.* 9*d.*, could be wholly worked out in the ordinary course of working in five years; that the limestone and ironstone under another portion, valued at £773 11*s.* 6*d.*, could be wholly worked out in eight and fifteen years respectively, and the ironstone and limestone under the remaining portion, valued at £57 16*s.* 5*d.*, could be wholly worked out in twenty years, and that the said sums of

(1) 37 Ch. D. 386. (2) 15 App. Cas. 19.

£687 19*s.* 9*d.*, £773 11*s.* 6*d.*, and £57 16*s.* 5*d.*, making altogether the compensation money £1519 7*s.* 8*d.*, had been arrived at upon the assumption that the said minerals could, in the ordinary course of working in the district, be wholly worked out and gotten within the above mentioned periods.

The Petitioner was forty-seven years of age, and now claimed the whole of the compensation money, on the ground that he would probably have been able to work out the whole of these minerals during his lifetime.

Butcher, for the Petitioner:—

As the minerals in respect of which this compensation money has been paid, were not of such extent that they could not possibly have been got during the life of the Petitioner, the tenant for life, he is entitled to the compensation money: *In re Barrington* (1). At the time the notice of intention to work was given, the Petitioner was only forty-two, and the evidence is, that the whole of these minerals could be worked out in twenty years. The Petitioner, therefore, is "absolutely entitled" within the meaning of the last clause of sect. 69 to these moneys. If the Petitioner is not entitled to the whole of the money in Court, at least he is entitled to £687 19*s.* 9*d.*, an apportioned part, representing the value of the minerals that could have been worked out in five years, because in January, 1886, he gave notice of his intention to work, and had it not been for the litigation that ensued between him and the company, he would by this time have worked out minerals to this amount at least; the other sums mentioned in the evidence of the surveyors should also be apportioned.

Stallard, for the remainderman and trustees:—

This was a sale by the tenant for life, under the statutory power of the *Lands Clauses Consolidation Act*, 1845, of a portion of the inheritance, and under these circumstances the tenant for life is only entitled to the income of the fund produced by such sale. Possibly the tenant for life might have worked out the bulk of these minerals had he opened the mines, but as a

(1) 33 Ch. D. 523.

CHITTY, J. 1891 *In re* ROBINSON'S SETTLEMENT TRUSTS.

fact he did not commence to work them; the case is wholly within sect. 69, which does not contemplate any apportionment. *In re Barrington* (1) is a decision under sect. 74, and does not apply. Minerals are just as much a portion of the inheritance as land: *Errington* v. *Metropolitan District Railway Company* (2), and the proceeds of sale must be dealt with in the same way. The Petitioner is not "absolutely entitled" to any portion of this money.

Sargant, for the railway company.

Butcher, in reply.

CHITTY, J. (after stating the nature of the application and the facts, and observing that there was no lease of these minerals at the time they were purchased by the railway, continued):—

The result is, that there was a sale of a portion of the inheritance by this tenant for life, under the statutory powers of the *Lands Clauses Consolidation Act*, 1845. Two arguments have been presented to me on behalf of the Petitioner: first, a reference was made to the 74th section of the Act, and to a decision of the present Lord Justice *Kay* in *In re Barrington*, the part of the judgment that was particularly relied on being at p. 528. In my opinion, sect. 74, and therefore the decision in *In re Barrington*, which was under that section, are not applicable to the case now before me. Sect. 74 relates to the taking of lands "where less than the whole fee simple thereof" is acquired, and provides that in such cases the Court may order the compensation money to be laid out, invested, or accumulated, and paid in such manner as it may consider will give to the parties interested in such money "the same benefit as they might lawfully have had from the lease estate or reversion, in respect of which such money shall have been paid, or as near thereto as may be." That section does not apply to this case, because the subject-matter of this sale does not come within the definition of the interests dealt with by that section. It is not necessary, therefore, that I should make any obervations on the decision

(1) 33 Ch. D. 523. (2) 19 Ch. D. 559.

in *In re Barrington* (1), beyond saying that I am satisfied that the Lord Justice *Kay* did not intend to depart from the meaning of the words in that section, and in the case before him he considered that the sum of £136 0*s.* 2*d.*, being that part of the compensation which was allotted to the lessor, would fairly represent the value of the reversion in the minerals which the tenant for life could have gotten but for the purchase by the railway company. There are expressions in the judgment which were laid hold of by Mr. *Butcher* to shew that the learned Judge took a different view, but in my opinion the argument that was founded on these expressions cannot be maintained. If any apportionment had to be made, the right mode of ascertaining the amount of compensation payable to the tenant for life would be, to ascertain the number of years within which the minerals could be worked out. Say, for instance, twenty years; then to divide the compensation money into twenty parts, and give the tenant for life one of such parts every year. That mode of payment would exactly correspond with his rights in the minerals if the railway company had not intervened; but, as I have already said, the 74th section does not, in my opinion, apply to this case. The sections that do apply are the 69th and 70th. Sect. 69, after providing for the payment into the Bank of England of the compensation, goes on to say, that the money shall remain so deposited until applied to some one or more of the following purposes, and taking the 1st, 2nd, and 3rd paragraphs, it may be said generally that these purposes are for the benefit of the inheritance, and not for the benefit of any person interested therein; then comes the 4th and last paragraph, on which alone the argument for the Petitioner can be founded, which runs: "In payment to any party becoming absolutely entitled to such money." On the face of it that paragraph makes no mention of apportionment, and when apportionment is intended in other parts of the Act, it is expressly provided for: this paragraph, however, treats the whole of the purchase, or compensation money, as belonging to some person who becomes "absolutely entitled," and it must be read with the preceding paragraphs which I have referred to. I am satisfied

(1) 33 Ch. D. 523.

CHITTY, J. 1891 *In re* ROBINSON'S SETTLEMENT TRUSTS.

on the true construction of sect. 69 that no apportionment can be directed. Then the argument on behalf of the Petitioner, which was ingenious, was to this effect: it said, if the tenant for life had worked these minerals, as it was his intention but for the railway company to do, he would, in all probability, have worked them out during his life, and so would have taken away from the inheritance minerals of the value of the sum now in Court; then it was said that during the five years, from the date of his notice to the railway to the present time, he would, according to the evidence, have worked out a certain portion of these minerals, which have been valued at £687 19*s.* 9*d.*, and, consequently, that at least, he is "absolutely entitled" to this amount; but before he can get this apportioned amount it is incumbent upon him to shew that the 69th section has directed an apportionment, and as I have already stated no apportionment is contemplated or directed by that section. Though there were these adverse proceedings between the tenant for life and the railway company, still, in point of law, the sale was effected by agreement, so that I have a tenant for life agreeing with the railway company for the sale of these minerals, separately from the land, under the statutory power of sale given him by the *Lands Clauses Consolidation Act*, 1845, and before he can take the purchase-money he must point out something in the power of sale which will entitle him to it, and this he has not done. By way of illustration I may refer to the usual powers of sale in settlements: there, when the power is exercised either by the trustees or the tenant for life, if land is sold with minerals under it, the tenant for life though unimpeachable for waste, does not take any part of the capital produced by such sale, but the income only. Then, as a further illustration, take the *Settled Land Act*, where the tenant for life has a statutory power of selling the mines and minerals separately from the land, and in that case the capital money has also to be invested. I refer to these instances merely by way of illustration, and as shewing that to succeed in his argument, the tenant for life in this case must shew an express provision in the *Lands Clauses Consolidation Act*, giving him the whole or some part of this compensation money.

One other observation is this: the *Lands Clauses Consolidation Act* has now been in force for over forty-five years, and I am unable to remember any instance in which a tenant for life has succeeded in obtaining any portion of the compensation money in a case of this kind. Mr. *Butcher* and Mr. *Stallard* have both made a search for authorities on this point, and neither of them has been able to produce one. I must make the usual order, viz.—that the whole of the money be invested, and the income only paid to the Petitioner during his life.

Solicitors: *Capel-Cure & Ball*; *Warren, Gardner & Murton*, for *G. & H. Lamb & Stringer, Kettering; Beale & Co.*

W. C. D.

In re BODMAN.
BODMAN *v.* BODMAN.

[1891 B. 743.]

Will—Construction—"Shares"—Debenture Stock.

A bequest of all a testator's "shares" in a public company will not pass debenture stock.

Dictum of *James*, L.J., in *Attree* v. *Hawe* (1), that debenture stock "is of the same nature as other stock of the company," and is "nothing but preference stock with a special preference," discussed and explained.

ADJOURNED SUMMONS.

Joseph Baker Bodman, who died in November, 1890, by his will of the 4th of November, 1887, made the following specific bequest: "I give all my shares in the *Harrow District Gas Company* to my executrixes" upon trust to sell the same and divide the net proceeds equally between themselves.

The *Harrow District Gas Company* was incorporated under a special Act of Parliament in 1873, which contained a power to issue debenture stock.

At the time of making his will, and at his death, the testator held ten £10 shares, and £200 Debenture Stock, in the above-named Company. The specific legatees claimed both the shares

(1) 9 Ch. D. 349.

CHITTY, J. 1891 *In re* BODMAN. BODMAN *v.* BODMAN.

and the debenture stock, and took out an originating summons to determine the question whether the words in the will passed debenture stock as well as shares.

H. Percival, for the specific legatees:—

A gift of "shares" in a railway company has been held to pass "stock": *Morrice* v. *Aylmer* (1); and for present purposes "shares" in a railway company and in a gas company are the same. "Debenture stock" is of the same nature as other "stock" of the company; it is nothing but preference stock with a special preference, according to *James*, L.J., in *Attree* v. *Hawe* (2). I admit that debentures would not have passed: *In re Lane* (3); but when debentures once become stock, that "stock" is just as correctly described by the words "shares in the company" as any other stock. The words used included, and were intended to pass, the whole of the testator's interest in this company.

E. Clayton, for the testator's next of kin:—

The testator had ten "shares" which answer the description in the will, and the words should not be extended to include stock of quite a different nature: *Gilliat* v. *Gilliat* (4). "Shares" mean a proprietary share or portion in the capital stock of the company; shares are but a subdivision of capital stock: that was the ground of the decision in *Morrice* v. *Aylmer*; but that decision cannot be extended so as to include debenture stock, which is stock of quite a different kind.

[*Dillon* v. *Arkins* (5) was also referred to.]

Percival, in reply.

CHITTY, J. (after stating the facts and the question raised for his decision, continued):—

It is clear that the term "shares" is sufficient to pass the testator's interest in the joint stock or capital of a company such as this, whether such capital consists only of shares, properly so called, or of consolidated stock; the principle is simple: whether

(1) Law Rep. 7 H. L. 717.
(2) 9 Ch. D. 349.
(3) 14 Ch. D. 856.
(4) 28 Beav. 481.
(5) 17 L. R. Ir. 636.

the capital is divided into shares, or consists of stock, a person who holds, say, ten £10 shares, or £100 stock, is rightly described as a holder of a "share" in the capital stock of the company; if the capital consists of, say, £100,000, the holder of the ten £10 shares, or £100 stock, would hold a thousandth part or share in the capital of the company. That is the result of the decision in *Morrice* v. *Aylmer* (1), which proceeded on the very clear and intelligible ground of the identity, in substance, of such stock with ordinary shares: but counsel for the specific legatees has argued, that since a gift in a will of "shares" has been held to pass "stock," that therefore a gift of "shares" will pass stock of any kind, including debenture stock, and in support of this argument he relies on a passage in the judgment of *James*, L.J., in *Attree* v. *Hawe* (2), to shew that there is no difference between proprietary stock and debenture stock. The passage relied on is as follows (3): "So far it is quite clear that the stock"—he is referring to debenture stock—"is of the same nature as other stock of the company, only with the important difference that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of the other stock. It is nothing but preference stock with a special preference." That passage, if I may say so, is perfectly accurate for the purposes of the decision then before the Court; but the words of *James*, L.J., must be read with reference to the question on which his judgment was given. The Lord Justice did not mean to say that there was absolutely no difference between debenture stock and proprietary stock for all purposes, but only that for the purposes of the Act of Geo. 2 there was no difference, because neither a debenture stock holder nor an ordinary stock holder had any right either at law or in equity under any circumstances to take possession of a single item of the property of the company in specie: or in other words, that a debenture stock holder had no more interest in land than a holder of any other stock had. The passage relied on, therefore, by the Plaintiff's counsel has no direct bearing on the case now before me.

That there is a material difference between debenture stock

(1) Law Rep. 7 H. L. 717. (2) 9 Ch. D. 337.
(3) 9 Ch. D. 349.

CHITTY, J. 1891 *In re* BODMAN. BODMAN *v.* BODMAN.

and proprietary stock is plain on referring to the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118), Part III., which regulates the creation and issue of debenture stock. The holder of debenture stock is a creditor of the company with a security in the assets of the company, though he has not all the rights of an ordinary secured creditor, because some of his rights have been taken away or modified by the *Companies Clauses Act*, 1863. The holder of proprietary stock is a member of the company, and has the right of participating in the dividends or net profits of the company—that is, the profits declared after all working expenses and previous charges, including interest on borrowed capital, have been paid. The holder of debenture stock is not a member of the company, and receives only a fixed rate of interest, whatever the net profits may have been. By sect. 23 it is directed that debenture stock with the interest thereon shall be a charge on the undertaking, prior to all "shares or stock" of the company; and by sect. 24 the interest thereon is to have priority over all dividends or interest on any "shares or stock of the company, whether ordinary, or preference, or guaranteed"; so that, on the face of these two sections, a distinction is made between debenture stock and other shares or stock. Then sect. 25 gives the holders of the prescribed amount of debenture stock the right to obtain the appointment of a receiver, if the interest is in arrear; but the most material difference between the holders of debenture stock and the holders of proprietary stock is to be found in sect. 31, which provides that the holder of debenture stock is not entitled to be present or vote at any meeting of the company. Debenture stock, therefore, stands in a materially different position from that occupied by proprietary or capital stock of the company; in other words, debenture stock is borrowed money capitalised for purposes of convenience.

The words used by this testator aptly and correctly describe his shares in this gas company, and I should be improperly extending the meaning of the word "shares" if I were to hold that it included debenture stock, which, as I have already explained, is property of a different kind altogether from the ordinary or proprietary stock of a company. The result, therefore, is, that the words, "all my shares in the *Harrow District*

Gas Company," are, in my opinion, insufficient to pass the £200 debenture stock.

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1891
In re BODMAN.
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Solicitors: *Clarke, Rawlins & Co.*, agents for *Percival & Son, Peterborough; Boulton, Sons, & Sandeman.*

W. C. D.

In re PHILLIPS' TRADE-MARKS.

CHITTY, J.
1891
April 24; *July* 29, 31.

Trade-mark—Registration—Practice—Alteration of Register by omitting words "trade mark"—Old Mark—Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 92.

Labels registered in 1878 as old marks, contained, with other matter, the words "*trade mark*," so placed as to appear to have particular reference to the device on the labels, rather than to the labels as a whole. In consequence of the observations of *Fry*, L.J., in *In re Apollinaris Company's Trade-marks* (1), the owner of these marks now applied for leave to alter the registration by striking out the words "*trade mark*:"—

Held, that the marks, being old marks, ought to be registered just as they were used prior to August, 1875, and that to strike out the words "*trade mark*" would be a material alteration: that, inasmuch as there had been an indication of an intention in these marks, as registered, to claim only the device as the trade-mark, the public were entitled to have the same indication of a restricted claim and the consequent protection, retained on the register, and that on these grounds the application must be refused.

In re Colman's Trade-marks (2) distinguished.

MOTION on behalf of *George Aldcroft Phillips*, of *Whit Lane, Pendleton*, near *Manchester*, soap manufacturer, trading as *David Thorn & Co.*, for leave to alter the registration of two of his registered trade-marks, Nos. 15792 and 15793 by omitting therefrom respectively the word "*trade-mark*."

Both marks had been registered in November, 1878, as old marks.

Mark No. 15792 consisted of a label within a square; on the upper part was printed in thick type the words "*Boaler's Soap*," the words being arranged in two lines; under the word "*Soap*" two straight lines were printed running nearly across the square, so as apparently to disconnect the upper portion of the label from

(1) [1891] 2 Ch. 186, 233. (2) [1891] 2 Ch. 402.

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the lower; below these two straight lines were the words "*trade mark*" printed immediately over a device consisting of printed lines, some arranged diagonally others vertically, and others horizontally. It appeared that the lower half of this label had already been registered by the Applicant as trade-mark No. 2641 for the same class of goods in February, 1876. This mark was still on the register, and been registered as an old mark.

Mark No. 15793, consisted of a similar label within a square, divided by two straight lines running nearly across the square. In the upper half were the words "*David Thorn & Co.'s Fine Castile Soap,*" printed in thick type, and in the lower half was a device consisting of a bull and a matador in an arena, with the words "*trade mark*" printed immediately underneath. The lower half of this label had also been already registered by the aplicant as trade-mark No. 2642, for the same class of goods in February, 1876. This mark was still on the register, and had been registered as an old mark.

In consequence of the observations of Lord Justice *Fry* in delivering judgment in the case of *In re Apollinaris Company's Trade-marks* (1), the applicant was desirous of amending the marks Nos. 15792 and 15793, by striking out the word "*trade-mark*" in each of them.

The application was opposed on behalf of the Comptroller by the Attorney-General, who suggested after the motion had been argued on behalf of the Applicant, that further evidence should be put in to shew the exact form in which these marks had been actually used prior to the 13th of August, 1875. The effect of this evidence and of the documents lodged by the Applicant when registration was applied for is sufficiently stated in the judgment.

John Cutler and *Mortimer Davis,* for the motion :—

The word "trade-mark" is not an essential particular. The Court has power under sect. 92 of the Act of 1883, to grant the leave now asked for on terms; we suggest that it should be granted on terms similar to those imposed in *In re Colman's Trade-marks* (2), if any terms are necessary; but as additions

(1) [1891] 2 Ch. 233. (2) [1891] 2 Ch. 402.

have been made without imposing terms in *Guinness & Co.'s Trade-mark* (1), where the word "*limited*" was added, and in *Reiss' Trade-mark* (2), we do not see why terms should be imposed.

[CHITTY, J. :—The report of those cases does not shew that the marks there were old marks.]

On the face of the labels, and on the evidence, there has been no misleading of the public or the trade by the use and position of these words "*trade mark*," and we ought to be allowed to take them off, and make our mark safe, and of such a character, that the observations of Lord Justice *Fry* in *In re Apollinaris Company's Trade-marks* (3) do not apply.

Sir *R. E. Webster*, A.-G., and *Ingle Joyce*, for the Comptroller :—

We oppose this application altogether. To allow the words "*trade mark*" to be struck out with a disclaimer would be no protection to the public. The marks, being old marks, ought to be registered just as they have been used, and to strike out the word "*trade-mark*" would be a very material alteration. Then in these old marks, as registered, there has been an indication of an intention to claim only the device as a trade-mark, and traders and the public are entitled to have the same indication of a restrictive claim with its consequent protection retained on the register. The application in *In re Colman's Trade-marks* (4) was practically a case on new marks only ; the present application relates exclusively to old marks. The Applicant has made out no case for being allowed to alter his old marks.

Cutler, in reply :—

The Applicant ought to be allowed to alter his marks in a non-essential particular, unless his doing so will cause an injury to anyone. The *Patents, Designs, and Trade Marks Act*, 1883, on the face of it makes no distinction between old and new marks, unless the trade-mark consists only of words.

(1) 5 Rep. Pat. Cas. 316.
(2) Ibid. 291.
(3) [1891] 2 Ch. 186.
(4) Ibid. 402.

CHITTY, J. 1891. July 31. CHITTY, J.:—

1891

In re PHILLIPS' TRADE-MARKS.

The Applicant, who is the registered proprietor of four trade-marks, applies under the 92nd section of the Act of 1883 for leave to alter two of his marks, viz., Nos. 15792 and 15793, by omitting from them the words "*trade mark.*" Under that section no alteration is permissible in any particular which is essential within the meaning of the Act. Subject to this restriction the Court has jurisdiction to permit an alteration; but this jurisdiction is discretionary; the Court may refuse or grant leave on such terms as it may think fit.

Assuming then that the alteration proposed is in a non-essential particular, an applicant cannot insist upon his proposed alteration as a matter of right; his application is addressed to the judicial discretion of the Court.

The application is opposed by the Attorney-General on behalf of the Comptroller in the interest of the public.

It is obvious that inasmuch as there is no actual litigation, and the parties interested in the trade are not before the Court, great caution is required in the exercise of the discretionary jurisdiction. Both the marks proposed to be altered are old marks—that is, marks which the Applicant claims to have used for several years prior to the 13th of August, 1875. [His Lordship, after stating the facts and dates of registration, and describing the marks, continued:—]

Now, in regard to the mark No. 15792 two things are clear. First, being claimed as an old mark the Applicant was bound to register the whole of the mark as used; secondly, that from the position of the words "*trade mark,*" in reference to the rest of the label, it may be contended by any person attacked as an infringer, that the only part claimed as a trade-mark is that which stands beneath the words "*trade mark,*" viz., the device.

As to these points, the Applicant has filed an affidavit in which he states (in substance) that his user of the mark No. 15792 before the 13th of August, 1875, was of the whole mark as it now stands on the register, including the words "*trade mark*"; that the words "*trade mark*" were not placed upon the mark for the purpose of indicating that any special part thereof was registered as a trade-mark, or that any other part was open for any

one else to copy; and that the word "*Boaler*" is a word which may be used by any person in the soap trade. The position of the Comptroller is such that he is not called upon to enter into a controversy about the accuracy of any of these statements which may or may not be in fact open to controversy.

In his statement, verified by statutory declaration, made on the occasion of his application to register No. 15792, the applicant described the trade-mark as consisting "of the words '*Boaler's Soap*' printed wholly in black ink in prominent letters and the words '*trade mark*,' and below the latter" (as he stated) "there is a device," which he then proceeded to describe. This is shewn by the production of the official documents. He then claimed the whole of the mark as registered, including the words "*Boaler's Soap*," and also the words "*trade mark*," which he now asks leave to strike out.

The ground for the application as stated by the Applicant's counsel is the apprehension felt as to the validity of the trade-mark in consequence of the observations of Lord Justice *Fry* in the *Apollinaris Case* (1), as to the misleading effect of the trade-mark No. 45096 (a new mark), in which there was a disc (in use coloured red) with the words "*trade mark*" printed under it so as to follow the circumference of the disc, and apparently to refer to the disc alone, with the word "*Friederichshall*" printed above the disc (2).

In these circumstances I consider that the Applicant must stand or fall by his mark as now registered, and that I ought not to grant the leave asked, and for the following reasons: First, because the mark, being claimed as an old mark, ought to be registered just as it was used, and to strike out the words "*trade mark*" would, in the circumstances of the case, be to allow an alteration which, though it may be of a non-essential particular, would be a material alteration. Secondly, because in this old mark, as it has stood on the register for upwards of twelve years, there is, to say the least of it, an indication of an intention to claim only the device as the trade-mark, and the public, and particularly the traders in soap, are entitled to have the same indication of a restrictive claim, and consequently the same

(1) [1891] 2 Ch. 186. (2) [1891] 2 Ch. 233; 8 Rep. Pat. Cas. 139, 142, 164.

CHITTY, J. 1891 *In re* PHILLIPS' TRADE-MARKS.

protection, retained on the register; and thirdly, because to allow the words "*trade mark*" to be struck out with a disclaimer (as was suggested by the Applicant's counsel) of the words "*Boaler's Soap*" would be for most purposes futile; for the effect would be, on a question of right, to reduce this trade-mark to the same thing identically as the trade-mark No. 2641 of 1876, while it would afford the Applicant the opportunity of practically using the whole of the mark 15792, less the omitted words, without the necessity of stating the disclaimer, which would be on the register only. The second of these reasons appears to me to be the most important.

My decision is not inconsistent with what Mr. Justice *Kekewich* did in *Colman's Case* (1). The circumstances are different, the decision being on new marks only, and the Attorney-General did not there offer any substantial opposition, indeed, the order seems to have been practically arranged. My decision is quite consistent with *Guinness' Case* (2), in which I allowed the addition of the word "*limited*" to a trade-mark which had become the property of the limited company. The 92nd section expressly authorizes an addition.

I have endeavoured in this judgment to avoid saying anything beyond what was necessary that might tend to prejudice the Applicant in any proceedings he may hereafter take founded on his trade-mark 15792.

The circumstances relating to the other mark No. 15793 proposed to be altered are practically the same in all respects with those relating to the mark No. 15792 with one slight exception only. In No. 15793 the position of the words "*trade mark*" is such as to afford somewhat less ground for contending that they relate to part only of the trade-mark registered. But there is no substantial difference for the purpose of the application between the two cases, and I decline to grant the leave asked as to No. 15793.

The Applicant must pay the Comptroller's costs.

Solicitors: *Ernest Salaman; Hare & Co.*

(1) [1891] 2 Ch. 402. (2) 5 Rep. Pat. Cas. 316.

W. C. D.

In re LLEWELLIN, A SOLICITOR.

CHITTY, J.
1891
July 21;
Aug. 5.

[1891 L. 539.]

Solicitor's Lien—Title Deeds held for Mortgagee—Costs of Mortgagee's Solicitor—Payment off of Mortgage—Right of Mortgagor to Return of Deeds.

When a mortgagee has been paid by the mortgagor his principal, interest, and costs, and has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the mortgagee's solicitor for work done relating to the mortgaged property during the continuance of the mortgage. The equitable right of the mortgagor to have back from the mortgagee his deeds on payment of principal, interest, and costs, prevails against the solicitor's lien claimed in right of the mortgagee.

Ogle v. *Story* (1) discussed and distinguished.

ADJOURNED SUMMONS for taxation and delivery of documents, raising the question as to the right of the mortgagee's solicitor, after the mortgage had been satisfied, to retain the deeds as against the mortgagor, for costs incurred for work done in respect of the mortgaged property during the mortgage.

The Respondent, *John Charles Llewellin*, had acted as solicitor for the Applicant, *David Sanders*, in obtaining a mortgage for him for £1000 on certain copyhold property in the county of *Monmouth*, in which he had a life interest. The documents in the Respondent's custody, on which he now claimed a lien, had all originally come into his possession as the Applicant's solicitor. The Respondent was also solicitor for the mortgagee, and when the mortgage from the Applicant was completed, such of the documents as related to the title to mortgaged property were retained by the Respondent in his character of mortgagee's solicitor.

All the costs of obtaining the mortgage had been paid by the Applicant. A year or so before the present summons was taken out, the Applicant came to an arrangement with his mortgagee, without any notice to the Respondent, by which a sum of money in full satisfaction and discharge of all moneys owing under or by virtue of the mortgage was paid, the Applicant was by deed

(1) 4 B. & Ad. 735.

CHITTY, J.
1891
In re LLEWELLIN, A SOLICITOR.

duly released, and the mortgage debt and security transferred to a new mortgagee. Subsequently the Applicant applied to the Respondent for his deeds and documents, when he was informed that the Applicant claimed a lien on them for the costs of an attempted sale of the mortgaged property, incurred on the instructions of the mortgagee. The Respondent then delivered his bill of costs, which was made out as against the Applicant personally, on the footing of his being the party chargeable. The Applicant then took out the present summons for taxation of the bill so delivered, with liberty to dispute wholly the retainer, and for delivery of all deeds and documents in his custody belonging to the Applicant, on payment of what should be found due to the Respondent on taxation.

On the summons being opened, it was admitted at the Bar that there was no retainer, and that the Respondent had no bill of costs against the Applicant personally: the question, therefore, of lien was the only one argued.

Maidlow, for the Applicant, on the question of retainer, mentioned *In re Jones* (1):—

The right of the solicitor is only coextensive with the right of his client the mortgagee: *Pratt* v. *Vizard* (2), and the mortgagee having been paid off the lien of his solicitor is gone, just as on a reconveyance or sale the solicitor for the mortgagee cannot hold the deeds against the mortgagor for costs due from the mortgagee: *Wakefield* v. *Newbon* (3); *Ogle* v. *Story* (4). I am, therefore, entitled to have my deeds delivered up.

A. J. Allen, for the Respondent:—

Ogle v. *Story* is a decision in my favour, shewing that the mortgagor cannot without the knowledge of the mortgagee's solicitor get rid of the solicitor's lien for mortgagee's costs. It appears from the evidence that these costs were costs incurred on an abortive sale, and they are costs properly payable by the mortgagor, and costs which cannot be got rid of by any private arrangement between mortgagor and mortgagee. The Court

(1) 36 Ch. D. 105.
(2) 2 N. & Man. 455.
(3) 6 Q. B. 276.
(4) 4 B. & Ad. 735.

will not summarily order a solicitor to deliver up a deed to his client unless it be clearly shewn that he has no lien upon it: *Ex parte Cobeldick* (1).

[*In re Jones* (2) was also referred to.]

Maidlow, in reply, referred to *Hollis* v. *Claridge* (3); *Cattell* v. *Simons* (4); *Pelly* v. *Wathen* (5).

1891. Aug. 5. CHITTY, J. (after stating the nature of the application and the facts, continued):—

I will assume in favour of the Respondent, that among the documents he holds there are some which relate to the title to the mortgaged property, and that though he received them originally from the Applicant the custody was changed; that he afterwards held them as solicitor for the mortgagee. The lien claimed on the documents of title is thus a lien in virtue of the right of the mortgagee to hold such documents.

It appears from the evidence that the Applicant has settled all accounts with his mortgagee: this statement is not denied or challenged by the Respondent. It thus appears that the mortgagee has no claim against the Applicant, the mortgagor, for the costs included in the bill in question, and consequently no lien as against him on the documents of title, nor any right to withhold them from *Sanders*. There is no suggestion in the evidence that the settlement of accounts between the Applicant and his mortgagee (who was mortgagee in possession) was come to for the purpose of defeating any lien of the Respondent; and it is therefore unnecessary to consider what might have been the effect of such evidence if given.

The question then is, whether the Respondent has any lien on the documents of title as against the Applicant. The nature of a solicitor's lien is so well established that it is scarcely necessary to state its nature, or on what grounds it is founded. It is not the result of contract; it is not an equitable charge; it is not an incumbrance affecting the estate itself (see the judgment of

(1) 12 Q. B. D. 149.
(2) 8 Beav. 479.
(3) 4 Taunt. 807.
(4) 6 Beav. 304.
(5) 1 D. M. & G. 16.

CHITTY, J. 1891 *In re* LLEWELLIN, A SOLICITOR.

Lord *St. Leonards* in *Blunden* v. *Desart* (1)). It does not confer on the solicitor any higher right to retain deeds than the client himself has. There is some error in the language attributed to the Judges who decided *Ogle* v. *Story* (2), where apparently an attorney's lien is spoken of as a "pledge." In the case as reported in the *Law Journal* (3) the term "pledge" does not appear. This case was cited as an authority for the Respondent; but it has no bearing on the case before me. It was an action to recover money from the attorney: the true ground of the decision was that the plaintiff had overpaid the mortgagee (*Fullwood*), and the plaintiff ought to have sued him and not the attorney (see the judgment of Lord *St. Leonards* in *Blunden* v. *Desart* (4)). The nature of a solicitor's lien is stated clearly in the judgment of the Court delivered by Lord *Cranworth* in *Pelly* v. *Wathen* (5). He says: "The general lien of a solicitor is merely a right to keep back from his client the deeds and papers, which he holds as solicitor, until his bill of costs is satisfied. It is a right derived entirely through the client, and therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor." And again (6) he says (in effect) that the right to hold title-deeds in virtue of a solicitor's lien is subject to all rights legal and equitable affecting them in the hands of the person from whom he received them. These principles are illustrated by numerous authorities which it is unnecessary to cite. From these it follows, that when the mortgagor has paid to the mortgagee all that is due to him for principal, interest, and costs, and the mortgagee has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgaged property pending the mortgage. The equitable right

(1) 2 D. & War. 418.
(2) 4 B. & Ad. 735.
(3) 2 L. J. (N.S.) (K. B.) 110.
(4) 2 D. & War. 426, 427.
(5) 1 D. M. & G. 23.
(6) Ibid. 27.

of the mortgagor to have back from the mortgagee his deeds, on payment of principal, interest, and costs, prevails against the solicitor's lien claimed in right of the mortgagee. In *Wakefield* v. *Newbon* (1) there had been a reconveyance to the mortgagor, and it was held that he was entitled to recover the deeds from the mortgagee's attorney. Here the mortgagee has released the mortgagor and conveyed the property to another mortgagee by the direction of the mortgagor. The only difference between the cases is, that there the mortgagor had a legal right to the deeds; here he only has an equitable right. If the new mortgagee had claimed the deeds the result might have been different; but he has made no such claim. The documents of title having originally come into the possession of the Respondent as solicitor for the Applicant, the Applicant is entitled to have them delivered back to him now that the lien is gone.

There is no question as to the Applicant's right to have back all documents belonging to him not relating to the mortgaged property.

The order must be in the usual form for delivery of all documents in the Respondent's hands on oath. The Respondent must pay the costs. Inasmuch as the documents came into the possession of the Respondent originally as solicitor for the Applicant, it is not necessary that an action should be brought; the order can properly be matter in the matter of the solicitor.

It is unnecessary to consider the question whether by setting up wrongly a lien to retain the documents for a debt due from the Applicant personally, the Respondent has not waived his lien: see *Dirks* v. *Richards* (2).

Solicitors: *Indermaur & Brown*, agents for *T. Roberts, Newport, Monmouth; Thomas White & Sons.*

(1) 6 Q. B. 276.

(2) 4 Man. & G. 574.

W. C. D.

CHITTY, J.

1891

March 12, 14: *June* 3, 4, 9.

DEAN *v.* DEAN.

[1890 D. 897.]

Will—Tenant for Life—Devise to such Children and Issue of Tenant for Life as either before or after Death of Tenant for Life should attain Twenty-one—Contingent Remainder—Executory Devise.

A gift to *A.* for life, and from and after the decease of *A.* unto and to the use of such child or children of *A.* living at his decease, and such issue then living of the child or children of *A.* then deceased, as either before or after the death of *A.* should attain the age of twenty-one years, or die under that age and leave issue :—

Held, that this limitation was an executory devise and not a contingent remainder.

In re Lechmere and Lloyd (1) and *Miles* v. *Jarvis* (2) followed. *Brackenbury* v. *Gibbons* (3) not followed.

The legal operation and effect of clauses for maintenance and advancement where no legal estate is vested in the trustees discussed and stated.

EDWARD DEAN, by his will dated the 24th of August, 1871, after making certain bequests, gave and devised four houses in *Devonshire Road*, *Chiswick*, to *Charles Matthews* and his son *Edward Dean* upon trust, to pay to each of his daughters, *Ann Fairman* and *Mary Hall*, during their respective lives one equal moiety of the rents and profits of the said houses when the same should become due and not by way of anticipation for her separate use independently of any husband. And from and after the death of his daughter *Ann Fairman* upon trust to convey one equal moiety of the freehold hereditaments to her children, *John Fairman* and *Elizabeth Fairman*, or to such one, if only one of them, as should be living at her decease and should either before or after that event attain the age of twenty-one years or, being a female, marry under that age, and to such issue living at the decease of his daughter of her said children or either of them then deceased as either before or after her decease should attain the age of twenty-one years and leave issue living at his, her, or their death or respective deaths as

(1) 18 Ch. D. 524.

(2) 24 Ch. D. 633.

(3) 2 Ch. D. 417.

tenants in common of more than one, and the heirs and assigns of such children, child, and issue respectively, but so that such issue should take only the share or respective shares which the deceased parent or parents would if living have taken; and from and after the death of his daughter *Mary Hall*, upon trust to convey one equal moiety of the said hereditaments to her children, *Mary Emma Habel* and *Julia Habel*, upon trusts similar in all respects to *Ann Fairman's* moiety, with cross-remainders over as to both moieties. And the said testator gave and devised the house in which he then resided to his wife for life if she should so long continue unmarried, and from and after her death or marriage unto his sons *Edward Dean* and *Robert Dean* for their respective lives as tenants in common with the like remainders and limitations as were thereafter declared of and concerning the residue of his real estate. And the testator gave and devised all his other freehold and copyhold hereditaments, subject to an annuity to his wife, to his sons *Edward Dean* and *Robert Dean* for their lives as tenants in common, and from and after the decease of his son *Edward Dean*, the testator gave and devised one equal moiety of the hereditaments and premises unto and to the use of such child or children of his son *Edward Dean* living at his decease, and such issue then living of the child or children of his son *Edward Dean* then deceased, as either before or after the death of his son *Edward Dean* should attain the age of twenty-one years, or die under that age and leave issue living at his, her, or their death, or respective deaths, as tenants in common if more than one and the heirs and assigns of such child or children or issue respectively, but so that such issue should take only the share or shares respectively which the deceased parent or parents if living would have taken. And from and after the decease of his son *Robert Dean* the testator devised his moiety of the hereditaments and premises to his children and issue in a similar manner to the moiety devised to *Edward Dean*; and in case there should be no such child or issue of his son *Edward Dean* who should become entitled to the first-mentioned moiety, then the testator gave and devised the same from and after the decease of his son *Edward Dean* unto and to the use of his son *Robert Dean* for his life, and from

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and after his decease unto the use of the child or children and issue of his son *Robert Dean* in like manner and under the same limitations as the moiety thereinbefore devised to them. And the will contained a similar cross-limitation in case there should be no child or issue of *Robert Dean*, and further that in case both his sons should die without leaving issue who should become entitled to the said hereditaments and premises under the provisions of that his will, then and in that case the testator gave and devised all the said hereditaments and premises to the said *Charles Matthews* and *Edward Dean* and their heirs upon the same trusts in favour of his daughters *Ann Fairman* and *Mary Hall* and their issue as were thereinbefore declared of and concerning his four freehold houses in *Chiswick*. And the testator gave and bequeathed all the rest, residue, and remainder of the property and effects of or to which he might be possessed or entitled at the time of his death to his sons *Edward Dean* and *Robert Dean*, their executors and administrators as tenants in common. And the testator empowered his trustees to apply all or any part of the income arising from any minor's presumptive share in any part of his property after the death of the preceding owner for life thereof (if any) for the maintenance and education of each such minor, notwithstanding that a parent of such minor might be living and able to provide the same. And the testator directed his trustees to invest and accumulate the unapplied income in augmentation of the capital of such share, and also authorized his trustees to apply, but with the consent of the life owner for the time being (if any), any part not exceeding one-half of the presumptive or vested share of any person under that his will for his or her advancement in the world, and empowered his trustees, for the purposes aforesaid, to pay such income or the money so to be raised unto the parent or guardian for the time being of any such minor as aforesaid without being in any way answerable for the application thereof. And the testator appointed the said *Charles Matthews* and *Edward Dean* executors of his will, but did not expressly appoint any person or persons trustee or trustees of his will.

The testator died on the 12th of November, 1872, seised in fee simple of certain freeholds and copyholds, and his will was proved

by his son, *Edward Dean*, alone, *Charles Matthews* having renounced probate and disclaimed the trusts of the will.

Ann Fairman died in the lifetime of the testator, and the testator's widow on the 22nd of September, 1888.

The testator's son, *Robert Dean*, died on the 12th of February, 1885, intestate, leaving his widow, *Mary Dean*, and four children, namely, the Defendant, *Edward Dean*, his eldest son and heir-at-law, the Defendant, *Robert Dean*, his youngest son and heir according to the custom of the copyholds, and two daughters, the Plaintiffs, *Laura Dean* and *Emily Dean*, all of whom were infants.

The testator's son, *Edward Dean*, who was illegitimate, died in June, 1889, intestate and a bachelor.

Elizabeth Fairman, in the will mentioned, in 1875 married *A. L. Stephenson*. There were four children of the marriage, all of whom were infants and Defendants. *Elizabeth Stephenson* died in 1884, and the testator's daughter, *Mary Hall*, in 1878.

The Plaintiffs claimed that their rights and interests in the freehold and copyhold hereditaments devised by the will of the testator in favour of his sons, *Edward Dean* and *Robert Dean*, and their respective children and issue, might be declared.

Byrne, Q.C., and *A. a'B. Terrell*, for the Plaintiffs:—

The limitation to the children of *Edward Dean* and *Robert Dean* must be construed to be an executory devise, and not a contingent remainder: *In re Lechmere and Lloyd* (1); *Miles* v. *Jarvis* (2); *Brackenbury* v. *Gibbons* (3). If, however, it is a contingent remainder, then, we submit, it is supported by a freehold estate in the trustees implied by the power of maintenance and advancement contained in the will.

[They also referred to *Andrew* v. *Andrew* (4); *Festing* v. *Allen* (5); *Muskett* v. *Eaton* (6).]

Tanner, for the Defendants *Edward Dean* and *Robert Dean*, in the same interest, referred to *Perceval* v. *Perceval* (7); *In re Jobson* (8).

(1) 18 Ch. D. 524.
(2) 24 Ch. D. 633.
(3) 2 Ch. D. 417.
(4) 1 Ch. D. 410.
(5) 12 M. & W. 279.
(6) 1 Ch. D. 435.
(7) Law Rep. 9 Eq. 386.
(8) 44 Ch. D. 154.

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Daniel Jones, for the Defendants *Mary Emma Habel* and *John Fairman*:—

The limitation must be construed as a contingent remainder, and the gift over to us has taken effect: *Brackenbury* v. *Gibbons* (1); *Rhodes* v. *Whitehead* (2); *Cole* v. *Sewell* (3); *Pearks* v. *Moseley* (4).

Method and *Bramwell Davis,* for Defendants in the same interest.

Ingle Joyce, for the Crown:—

The claim of the Crown arises in consequence of the illegitimacy of *Edward Dean.*

The Crown is not barred by any trust: *Chitty* on Prerogative (5).

Byrne, in reply.

June 9. CHITTY, J.:—

Apart from the clauses as to maintenance and advancement, this case is not distinguishable from *Brackenbury* v. *Gibbons* and *In re Lechmere and Lloyd* (6). The decisions in those cases are conflicting. In the former, *Hall,* V.C., had present to his mind two rules of law; the first, as he stated it, "that every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise"; and, secondly, that a contingent remainder fails unless it is ready to take effect in possession immediately on the determination of the particular freehold estate. He applied both rules. In the latter case, the Master of the Rolls (Sir *G. Jessel*) declined to apply the first rule, and held that the limitation was a valid executory devise. The distinction which he drew between a future limitation to all the children of a tenant for life who shall attain twenty-one and a future limitation to all the children of a tenant for life who either during his life or afterwards shall attain twenty-one, seems at first sight subtle and over-refined. So far as the testator's inten-

(1) 2 Ch. D. 417.
(2) 2 Dr. & Sm. 532.
(3) 4 D. & War. 1.
(4) 5 App. Cas. 714.
(5) Page 234.
(6) 18 Ch. D. 524.

tion is concerned, the meaning of the limitations is the same; in both cases the testator intends that all the children who attain twenty-one, whether before or after the death of the tenant for life, shall take; and it would seem strange to any one not acquainted with the niceties of the law relating to real property in this country, that any different legal effect should be given to a mere difference in words which mean the same thing. But a difference in the mere form of words does in several cases make a difference in law. For instance, where there is a limitation of real estate to a man for life, or until he shall attempt to aliene, and a limitation over on such attempt, both limitations are valid and effectual; but, if intending the very same thing, the testator limits the real estate to a man for his life, and then adds a condition that he shall not aliene, and that if he does, the property shall go over, the condition and gift over are void.

Now, the reasoning upon which the decision in *In re Lechmere and Lloyd* (1) is founded appears to be this: by the express words that those who attain twenty-one after the determination of the preceding estate are to take, the testator shews that, in the event which he contemplates of all the children not attaining twenty-one in the lifetime of the tenant for life, there is to be a gap between the determination of the preceding estate and the future estate to the children. The testator has used such a form of gift, as on the face of it, is inapplicable to a remainder; and, consequently, the Court is precluded from applying the rule that every gift which can take effect as a remainder must not be construed as an executory devise. The Court cannot construe the gift as a remainder unless it strikes out part of the express limitation; and the rule referred to neither requires nor justifies such an alteration of the testator's language.

According to the judgment of the Court in *Festing* v. *Allen* (2), a contingent remainder to the children of the tenants for life who attain twenty-one, vests absolutely in those children who, at the death of the tenant for life, have attained that age, to the exclusion of those who subsequently attain that age. But, according to the reasoning now under consideration, where the limitation is to children who either before or after the death of the tenant

(1) 18 Ch. D. 524. (2) 12 M. & W. 279.

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for life attain the age of twenty-one, the testator expressly attaches the qualification of membership of the class to those children who attain the age after the tenant for life's death, and, in order to give effect to the express and lawful limitation in favour of such children, the Court is bound to hold that the limitation taken in its entirety is an executory devise. This reasoning, subtle as it may appear to be, is not more subtle or artificial than the reasoning of a scholastic character which the Common Law Judges of former times applied to cases of this kind; and, I think, that, having regard to the subject-matter, it may be accepted as correct. It has the merit of giving effect to a lawful intention expressed in clear terms.

But I am not under the necessity of choosing between these two conflicting authorities. In *Miles* v. *Jarvis* (1) the present Lord Justice *Kay* followed the decision of the late Master of the Rolls in preference to that of the late Vice-Chancellor *Hall*.

The weight of modern authority is, therefore, in favour of my holding that the limitation in question before me is an executory devise, apart from the clauses as to maintenance and advancement.

These clauses appear to afford additional reasons for holding the limitation to be an executory devise. It was argued that the clauses do not apply to the devises where the devisees take directly the legal estate; that they apply only where under the other gifts in the will, the legal estate passes to the trustees, and the beneficiaries take merely equitable interests under the trusts declared. But this argument does not give proper effect to the words "all or any part of the income arising from any minor's presumptive share in any part of my property" in the maintenance clause, or the words "presumptive or vested share of any person under this my will," in the advancement clause. I am of opinion that these clauses apply not only where the trustees take the legal estate, but also where the beneficiaries take it directly. The question then arises, what is the legal operation and effect of these clauses? Where the legal estate in fee is vested in trustees, the powers are equitable powers

(1) 24 Ch. D. 633.

only. But where no legal estate is vested in the trustees, as is the case in reference to the questions raised in this action, it is necessary, in order to give effect to the clauses as they stand, to imply some legal right or estate in the trustees: unless such an implication is made, the trustees could not execute the power of "applying" the rents which is conferred upon them, nor could they accumulate the surplus rents according to the direction given to them; nor could they raise the money for advancement. Ought then a legal estate or merely legal powers to be implied? If the former, it would, I apprehend, regard being had to the maintenance clause, be arguable that it was at least a legal estate to arise on the determination of the preceding life estate, and to continue during the respective lives of the children presumptively entitled so long as they were under age in their respective shares, and that such an estate would be a determinable estate of freehold *pur autre vie*, and sufficient to support the limitation to the minors respectively if construed as contingent remainders. But, in my opinion, to imply an estate in the trustees would be going beyond what is necessary and would not be justifiable, having regard to the other parts of the will where the estates are expressly devised to trustees. I think then the right construction is to imply a legal power in the trustees named in the will to enter upon the devised lands, and to take the profits sufficient to enable them to execute the express power of maintenance, and the direction or trust to accumulate the surplus rents; and also a legal power in the same trustees by way of revocation of uses or otherwise, sufficient to enable them to raise the money required for advancement under the express power of advancement. These powers would pass to new trustees. The power to appoint new trustees expressly declares that the powers and discretions vested in the trustees named in the will shall be exerciseable by the trustees or trustee, for the time being, of the will.

The manner in which the maintenance and advancement clauses support the construction that the limitations in favour of the children, and issue of *Edward* and *Robert* are executory devises is that they contemplate and make express provision for the event of there being a gap between the determination of the

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preceding life estates and the vesting of the estate in the children or other issue.

The question then arises, what has become of the legal estate since the deaths of the tenants for life during the suspense period? It was claimed by the beneficiaries as having passed to the trustees named in the will by virtue of the limitations in case both the testator's sons, *Edward* and *Robert*, should die without leaving issue, who would become entitled under the provisions of the will. But this claim cannot be maintained. The estate does not pass under this devise until after it has been ascertained that there is no issue entitled. I think it passed under the residuary devise. Consequently it vested in the two sons as tenants in common. On the death of *Robert*, who died in 1885, his moiety passed as to the freeholds to *Edward* his eldest son as his heir-at-law, and as to the copyholds to *Robert* his youngest son, as his heir according to the custom of the manor. On the death in 1889 of *Edward*, who was illegitimate, his moiety passed, as to the freeholds, to the Crown, and as to the copyholds, to the lord of the manor. But the legal estate during this suspense period is subject to the implied powers already stated, apart from any question as to the prerogative of the Crown.

Solicitors: *Finnis & Wylie; Barnes & Bernard; Nicol, Son, & Jones; Hillearys; Hare & Co.*

G. M.

NORTH, J.
1891
May 28.

In re AMOS.
CARRIER *v.* PRICE.

[1891 A. 118.]

Trade Union—Power to acquire and hold Land—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 7 [*Revised Ed. Statutes, vol. xvi., p.* 619]—*Will—Construction—Devise to A. "for his life and the life of his heir"—Validity.*

A trade union registered under the *Trade Union Acts* can, by virtue of the provisions of sect. 7 of the *Trade Union Act*, 1871, but not otherwise, acquire and hold land.

The word "purchase" in that section is used in its ordinary sense of "buy for money;" not in the technical legal sense of "acquire otherwise than by descent or escheat," and consequently a devise of land by will to such a society is invalid.

A testator devised land to *A.* "for his life and the life of his heir":—

Held, that the devise was legally valid, and that the effect was to give to the devisee an estate during his own life and the life of the person who should be ascertained to be his heir at the time of his death.

ORIGINATING summons by the executors of the will of *James Amos*, asking for the determination by the Court of questions arising in the administration of his estate.

By his will, dated the 20th of October, 1888, the testator appointed *Robert Carrier* and *J. N. Clark* to be his executors. And he gave, devised, and bequeathed unto *Thomas Price* a leasehold house known as 27, *Bath Terrace*, "the conditions to be as follows:—that the property be left to him for his life and for the life of his heir, after which it becomes the property of the *Boiler Makers and Iron Ship Builders Society*." There followed similar gifts in precisely similar terms, and subject to exactly similar conditions, of two other (freehold) houses to *Henry Poole* and *Thomas Henry Williams* respectively. The will continued thus, "that each of the above keep the property held by them in good repair, and shall pay to the trustees the sum of 4*s.* per week, until the whole of the mortgage be paid. And that the further sum of £3 6*s.* 8*d.* each per annum be paid by them to be disposed of as follows: viz., £5 per annum to the

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Boiler Makers Benevolent Fund, and £5 per annum to the executors. Should either of the parties refuse or fail to comply with the foregoing conditions they shall forfeit all rights to the property, and the executors shall cause the same to be handed over to the *Boiler Makers Society* forthwith."

The attesting witnesses to the will were the two executors.

The Defendants to the summons were the three devisees, *Price*, *Poole*, and *Williams*; the *Boiler Makers and Iron Ship Builders Society*; and the *Boiler Makers Benevolent Fund*; and *Elizabeth Reece*, the wife of *J. H. Reece*, who was the heiress-at-law and one of the next of kin of the testator.

The *Boiler Makers Society* was registered under the *Trade Union Acts*, 1871 and 1876. It was governed by an executive council. The rules provided for the payment by members of monthly contributions for the purpose of forming a fund for providing weekly pay for the members during sickness, superannuation allowances, and other pecuniary benefits. There were also provisions relating to strikes and trade disputes. Rule 39 provided for the formation of a Benevolent Fund for the benefit of the widows and children of members. This fund was under the control of the executive council.

The summons asked that a construction might be put upon the devises, bequests, and directions in the will contained of and concerning the three houses given to *Price*, *Poole*, and *Williams* respectively, and that the effect of the gift of £5 per annum to the *Boiler Makers Benevolent Fund* and £5 per annum to the executors might be determined.

Robertson-Macdonald, for the Plaintiffs.

Charles Church, for the Defendants *Price* and *Williams*:—

The devisees take respectively an estate *pur autre vie*, and the gifts to them are valid. The heir is a *persona designata*, who must be ascertained at the moment of the ancestor's death.

The *Boiler Makers Society* is really a charity: *Pease* v. *Pattinson* (1); and a gift of land to them by will is void under the *Mortmain Act*, unless it is made valid by the *Trade Union Act*, 1871.

(1) 32 Ch. D. 154.

The *Benevolent Fund* is part of the society, and the gift of £5 a year to that fund is equally void. It is in substance a gift of a rent charge. If the society is not a charity the gifts to it are void on the ground that they tend to a perpetuity: *In re Clark's Trust* (1).

The society cannot hold land, except under the authority of sect. 7 (2) of the *Trade Union Act* of 1871, and that section only authorizes them to take land, not exceeding an acre, by purchase or lease. It does not authorize them to take land by devise. The section must be construed strictly.

J. C. Gordon, for the Defendant *Poole*:—

Poole at any rate takes an estate for his own life, and it is possible that the testator intended that after *Poole's* death his heir should take the house for his life.

The gifts to the society are invalid, because it is a charity: *Spiller* v. *Maude* (3).

H. J. Hood, for the heiress-at-law and the next of kin of the testator:—

The testator has attempted to give to each of the three devisees an estate for his own life, and after his death for the life of an unascertained person. Such an estate is unknown to the law.

[NORTH, J.:—The heir is ascertained at the moment of the ancestor's death.]

An estate *pur autre vie* must be for the life of a person ascertained during the tenant's own life, not for the life of a person ascertained only on the termination of the tenant's own prior estate for his own life.

The *Benevolent Fund* is clearly a charity.

The word "purchase" in sect. 7 is used in its popular meaning of "buy"; not in the technical legal sense of taking otherwise than by descent or escheat. Sect. 7 does not apply to a devise,

(1) 1 Ch. D. 497.

(2) Sect. 7 provides that "it shall be lawful for any trade union registered under this Act to purchase or take upon lease in the names of the trustees for the time being of such union any land not exceeding one acre, and to sell, exchange, mortgage, or let the same."

(3) 32 Ch. D. 158, n.

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and the devise to the union is void as tending to a perpetuity: *Carne* v. *Long* (1). The payments to be made by the devisees are in the nature of rent charges, and the *Mortmain Act* makes them void for the benefit of the heir or next of kin of the testator.

Upjohn, for the *Boiler Makers Union* and the *Benevolent Fund*:—

A trade union registered under the Act is not a corporation, but it is not a charity. *Pease* v. *Pattinson* (2) is not consistent with *In re Clark's Trust* (3) or *Spiller* v. *Maude* (4).

The purposes of the society do not involve a perpetuity. *Carne* v. *Long* is distinguishable, for the society has power under sect 7. of the Act of 1871 to sell land. Independently of sect. 7 it can take land; it is not a corporation, or a charity, or an illegal association. A devise to the society is a devise to the members, just as a devise to a partnership firm would be a devise to the partners. All the members together could sell the land.

But the word "purchase" in sect. 7 is used in its technical legal sense, "take otherwise than by descent or escheat." *Primâ facie* words used in any document are to be construed in their technical sense: *Reg.* v. *Castro* (5). The secretary or the committee of the society could contract for the purchase of land to be conveyed to the trustees, and specific performance of such a contract would be enforced. The trustees are mere machinery. The technical meaning of the word "purchase" is shewn by *Coke* upon *Littleton* (6); *Hargrave's* note (7); *Blackstone's* Commentaries (8); *Williams* on Real Property (9); *Ex parte Hillman* (10). A devise under a will is a purchase in law.

The *Benevolent Fund* may be a charity, but the gift of £5 a year to it is not an interest in land. It is only a personal payment by the devisees, and, if it was not paid, there would be no remedy against the land: *In re Thompson* (11).

Charles Church, in reply.

(1) 2 D. F. & J. 75.
(2) 32 Ch. D. 154.
(3) 1 Ch. D. 497.
(4) 32 Ch. D. 158, n.
(5) Law Rep. 9 Q. B. 350, 360.
(6) 18 b.
(7) No. 106.
(8) 21st Ed. vol. ii. p. 241.
(9) 14th Ed. p. 103.
(10) 10 Ch. D. 622.
(11) 45 Ch. D. 161.

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NORTH, J.:—

By his will the testator appointed two persons to be his executors, but he made no devise or bequest to them, although, of course, the personal estate would vest in them for the purpose of their performing their duty as executors. Then comes this gift, "I give, devise, and bequeath unto *Thomas Price* the property known as 27, *Bath Terrace*, the conditions to be as follows:—that the property be left to him for his life and for the life of his heir, after which it becomes the property of the *Boiler Makers and Iron Ship Builders Society*." Then two other houses are given to two other persons in substantially identical words, the only difference being that the first house is leasehold and the other two houses are freehold. The conditions in each case are exactly the same as those which I have read. Then comes this, "That each of the above," that is, each devisee, "keep the property held by them in good repair, and shall pay to the trustees the sum of 4*s.* per week, until the whole of the mortgage be paid." That clearly throws the burden of the mortgage on the three houses in equal proportions, and all that is to be done is to pay this sum of 4*s.* per week until the whole debt is paid, if the mortgagee is content to be paid in that way. If he is not, he can enforce his rights under his mortgage. The will goes on, "And that the further sum of £3 6*s.* 8*d.* each per annum be paid by them to be disposed of as follows: viz., £5 per annum to the *Boiler Makers Benevolent Fund*, and £5 per annum to the executors. Should either of the parties refuse or fail to comply with the foregoing conditions they shall forfeit all rights to the property, and the executors shall cause the same to be handed over to the *Boiler Makers Society* forthwith." So that the limitation of each house is complete in itself—to the devisee, for the lives of himself and his heir, after which the house becomes the property of the society. The society, therefore, take in remainder after the estate given by the previous words. The effect of the final clause is, that, the *interim* estate having come to an end, the remainder to the *Boiler Makers Society* is accelerated.

I think the most convenient course will be to consider first the effect of the gift to the *Boiler Makers Society*. There are

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two bodies mentioned, the *Boiler Makers Society*, and the *Boiler Makers Benevolent Fund*. I think it is clear from the rules of the society that the *Boiler Makers Benevolent Fund* merely means a fund administered by the *Boiler Makers Society* under rule 39. Under the rules a certain sum is appropriated as a benevolent fund, and it is to be applied under the control of the executive council, and the meaning of this bequest, as I read it, is, to add £5 per annum to that fund, so that there will be so much more at the disposal of the persons who administer it. In my opinion, it is a gift to the *Boiler Makers Society* for the purposes of the benevolent fund which they have to administer.

Then, construing the ultimate gift first, what is meant by the property being "handed over to the *Boiler Makers Society*"? That society is a trade union registered under the *Trade Union Act* of 1871, but it is not a corporation. It is a body which exists for certain purposes contemplated by the Act, but for no others. In my opinion the devise and bequest in remainder to the *Boiler Makers Society* cannot have any effect at all. In the first place, independently of the Act, what is the meaning of it? It is, beyond question, in my opinion, a perpetuity, or a gift tending to a perpetuity. It is not intended for the benefit of the particular individuals constituting the society at the time. It was suggested in argument that the gift might have the effect of vesting the property in all the existing members as joint tenants or tenants in common. But, in my opinion, that is not the effect of the gift. Such a construction would be entirely contrary to the testator's intention, because, instead of the property being administered by the executive body of the *Boiler Makers Society* for the purposes of the society, it would belong to a number of individuals as their common property, so that any one of them might at any moment commence an action for partition or sale, thus taking the control away from the society altogether, and simply dividing the property among themselves for their own benefit. That was not the intention of the testator. The only alternative construction is, that it is a gift to the society for the purposes of the society. Beyond all question that is a perpetuity; *Carne* v. *Long* (1) and the observa-

(1) 2 D. F. & J. 75.

tions of Vice-Chancellor *Hall* in *In re Clark's Trust* (1) are conclusive on the point.

There is this further difficulty. I do not see how this body are capable of taking land at all, whether in perpetuity or otherwise. It is said that, assuming this to be so but for the Act of 1871, that Act authorizes the society to acquire land and to hold it. Sect. 7 provides that "It shall be lawful for any Trade Union registered under this Act to purchase or take upon lease in the names of the trustees for the time being of such Union any land not exceeding one acre, and to sell, exchange, mortgage, or let the same." The latter part of the section which authorizes the dealing with such land applies to land which has been properly acquired, but it does not throw any light on the earlier part of the section. It is argued that the society can take these three houses in remainder under the will, because it is lawful for them to "purchase" land, and it is said that "purchase" means "acquire otherwise than by descent or escheat"; and, therefore, a devise or bequest of property confers on the person to whom it is made an interest by purchase. In my opinion, that is not the meaning of the word "purchase" as used in this section. No doubt, the word is sometimes used by lawyers in that sense, but that is not its natural ordinary meaning. It is an addition to the ordinary meaning. So to construe the word in this section would strain the language very much. It is to be lawful for the society "to purchase or take upon lease." If "purchase" meant "acquire otherwise than by descent or escheat," taking on lease would be a "purchase," and the words, "or take upon lease," would be tautologous; they would suggest as an alternative that which is really comprised in the previous word. "Purchase" and "take on lease" are put in contrast with one another, "purchase" referring (I do not say necessarily) to a purchase out and out on payment of a sum of money down, as distinguished from a tenancy at a yearly rent. I do not say that "purchase" means nothing else; I think it would be satisfied by their buying up an existing lease. But, in my opinion, by "purchase or take on lease" is meant the acquiring by the payment of money of property which they may acquire either by purchase out and out,

(1) 1 Ch. D. 497.

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or, if they please, by taking a lease of it. The subsequent words of the section are not immaterial. That which is contemplated is a purchase in the names of the trustees for the time being. How a devise to the society could be a purchase in the names of the trustees for the time being, I fail to understand. Then the section goes on to limit the quantity of land to be taken—"purchase any land not exceeding an acre in quantity." That points to the acquisition of land for purposes connected with the administration of the business of the society, probably for an office. I do not say it is confined to that; there might be other purposes for which it would be desirable to acquire land; but that is the kind of thing for which it is considered that the acquisition of land may be desirable. In my opinion, the section has nothing to do with the acquisition of land as forming part of the substratum of the society itself, and it does not authorize this society to take land by devise under the terms of this will. Consequently, the devise to the society is void, and the person to take the freehold property would be the heir-at-law of the testator in the case of the two freehold houses, and the next of kin of the testator in the case of the leasehold house.

As to the bequest of £5 a year to the *Boiler Makers Benevolent Fund*, I cannot distinguish it from the gift in remainder to the *Boiler Makers Society*. The bequest of £5 a year was, in my opinion, a gift to the society for the purposes of their *Benevolent Fund* by way of anticipation of that which they would get when the life interests came to an end, and, in my opinion, it is a gift connected with the land. It is made payable by the person who has the land, and, in my opinion, it is open to objection on many grounds, one of which is that it is contrary to the *Statute of Mortmain*.

The only remaining question is, what interest do the tenants for life take? I confess I do not understand what the testator had in his mind; and I can only construe his language as I find it. In my opinion, the property is given to each devisee or legatee for a limited interest, which is described as "for his life and for the life of his heir." For the devisee's own life the gift is clearly good. The question is, whether the interest which he takes comes to an end upon his death, the interest for the life of

his heir being too vague to be recognised. I do not see any reason in point of law which prevents the gift from being good. There is no hiatus of any kind; the gift to the devisee for his life would necessarily come to an end at his death. But at the very moment of his death the person who is his heir is ascertained, and there is nothing discontinuous in the limitation which prevents it from being good. I see no ground for saying that the heir takes beneficially. In my opinion, it is a limitation to a tenant for two lives, the lives being his own and that of his heir in each case. I think that is the meaning of the testator's words, and I can see nothing in law to prevent their taking effect.

The two annual payments to the executors and to the *Benevolent Fund* are void. The payment of these sums is a condition subsequent, and, as the person who takes the land cannot legally pay them, he is not liable to forfeit his land by reason of his not doing that which he cannot legally do.

Solicitors: *Prior, Church, & Adams; C. L. Kingdon; Darley & Cumberland; Woodcock, Ryland, & Parker.*

W. L. C.

In re FREME. FREME *v.* LOGAN.

[1889 F. 372.]

Contingent Remainder—40 & 41 *Vict. c.* 33 [*Revised Ed. Statutes, vol. xviii., p.* 383]—*Equitable Estate—Intestacy—Incomes.*

An equitable contingent remainder created before the Act 40 & 41 Vict. c. 33, which becomes clothed with the legal estate after the passing of the Act is not defeated by the failure of the prior life interest; nor would it have been defeated by becoming clothed with the legal estate if the Act had not been passed.

THIS was the trial of an action to obtain declarations as to certain questions which arose in the administration of the estate of *William Purser Freme*, who died in 1878, having made a will and a codicil by which he devised and bequeathed his freehold

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estate called *Wepre Hall Estate*, a farm called *Shilton Hall Farm*, the messuages and other property lately purchased by him from *Lord Spencer*, and also all his house property in *Renshaw Street, Liverpool*, and also his five houses in *Purser Street, Liverpool*, and all his ground rents in *Liverpool*, to his son, *James Freme*, for life; and from and after his decease, subject to a power of appointment to his son *James Freme*, the testator devised and bequeathed "the same unto and amongst all the children of my said son *James*, who, being a son, shall attain the age of twenty-one years, or being a daughter, shall attain that age or marry under that age, equally between them." He devised and bequeathed his residuary estate to his son *James*.

He made a codicil, which did not affect the matters in question.

At the time of the testator's death part of the *Wepre Hall* estate was freehold, and was subject to a mortgage. The remainder of the *Wepre* estate and the *Shilton Hall Farm* and other property purchased from *Lord Spencer* were freehold and unincumbered. The house property in *Renshaw Street* was partly freehold and partly leasehold, and was in mortgage. The houses in *Purser Street* were in settlement and were affected by the residuary devise but not otherwise affected by the will.

In June, 1886, *H. Davison* and *S. F. Clement* were appointed by the Court trustees of the settlement created by the testator's will and codicil for the purposes of the *Settled Land Act*, 1882.

In 1887, part of the *Shilton* estate was sold by *James Freme* as tenant for life under the *Settled Land Act*, 1882, and the purchase money was applied partly in discharging the incumbrances on the *Renshaw Street* property, partly in reducing the other incumbrances. The freehold part of the *Renshaw Street* property was conveyed to the uses of the will, the leasehold part to *C. B. Logan*, the trustee of the testator's will. The leaseholds were renewed in consideration of a fine paid by *James Freme*.

James Freme died in April, 1888, intestate, without having exercised the power of appointment given him by the will. He left three children only, *John Rowdon Freme*, his heir, *Thomas James Freme*, and *Sydney Herbert Freme*, all of whom were infants.

The action was brought by the two younger children of *James Freme*. The Defendants were a person who was trustee under the will, the heir of *James Freme*, the trustees for the purposes of the *Settled Land Act*, and the executor of hte will. The object of the action was to have the rights and interests of the parties under the will declared.

Samuel Hall, Q.C., and *E. S. Ford*, for the Plaintiffs :—

It is settled that an equity of redemption being an equitable interest is not subject to the legal rule which makes a legal contingent remainder created by an instrument executed before the passing of the Act to amend the law as to contingent remainders (40 & 41 Vict. c. 33), liable to be destroyed by the failure of the prior particular estate : *Astley* v. *Micklethwait* (1). The clothing of the equitable interest with the legal estate in the mortgaged freehold by the reconveyance subsequent to the Act, created a legal contingent remainder by an instrument executed after the passing of the Act. The remainder, therefore, came within the provision of the Act and was not defeated.

But even if the Act had not been passed, an indefeasible equitable interest once created could not become defeasible by the addition of the legal interest.

Cozens-Hardy, Q.C., and *Arkle*, for the heir of *James Freme* :—

The contingent remainder in the mortgaged premises was created by an instrument made before the passing of the Act. So long as it was an equitable remainder it was not liable to be destroyed by the failure of the previous life-interest ; but when it became a legal interest it became subject to the incidents of a legal estate and perished on the death of the tenant for life.

Benn, for the trustee of the will and for the executor.

Napier Higgins, Q.C., and *Ashworth James*, for *H. Davison*, for the purposes of the *Settled Land Act*, 1882.

Dibdin, for *S. F. Clement*.

(1) 15 Ch. D. 59.

NORTH, J. North, J.:—

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In re Freme. Freme *v.* Logan.

I think the view that Mr. *Hall* suggested is the right one. I think that all that was created by the will was an equitable contingent remainder that was not subject to the defect of failure by reason of the absence of a sufficient freehold to support it; and I do not think that the subsequent acquisition of the legal estate by the deed of 1887, can do any harm, whatever effect it might have produced if that deed had been dated before the time when the Act in question came into operation. In addition to that my impression is that there is another answer to this case, namely, the point that the contingent limitations being equitable only are not subject to being defeated by the absence of any freehold to support them, even though they had while contingent been clothed with the legal estate, and I think that that in effect is to be gathered from what fell from Vice-Chancellor *Malins* in *Astley* v. *Micklethwait* (1). I think, therefore, that there are two reasons that prevent the failure of this contingent remainder.

Solicitors for Plaintiffs: *Chester, Mayhew & Co.*, agents for *Peele & Peele, Shrewsbury.*

Solicitors for one trustee for the purpose of *Settled Land Act: Bridges, Sawtell & Co.*

Solicitors for the other parties: *Field, Roscoe & Co.*, agents for *Gibbons & Arkle, Liverpool.*

(1) 15 Ch. D. 59.

D. P.

In re RUSSELL, CORDNER & CO.

NORTH, J.

1891

June 6, 13.

Company—Winding-up—Voluntary Winding-up—Right of Creditor to Compulsory Order — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 145 [*Revised Ed. Statutes, vol. xiv. p.* 234]—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 8, 9.

Notwithstanding the powers conferred upon the Court by the *Companies* (*Winding-up*) *Act*, 1890, a creditor is not entitled to an order for the compulsory winding-up of a company which has resolved to wind up voluntarily, unless he can shew, as provided by sect. 145 of the *Companies Act*, 1862, that his rights will be prejudiced by the voluntary winding-up.

TWO petitions were presented for the winding-up of this company by the Court.

The nominal capital of the company was £100,000, divided into 10,000 shares of £10 each.

On the 14th of January, 1891, 2107 shares had been issued, and on them the sum of £5 per share had been called up. There had also been issued 300 shares as fully paid up.

The first petition was presented on the 18th of April, 1891, by *Sarah Eliza Hodge*, widow. The petition stated that by a deed of mortgage dated the 29th of April, 1890, made between the company and herself, the company covenanted with her to pay her the sum of £200, with interest at the rate of 7½ per cent., on the 29th of October, 1890, and also to pay interest at that rate half-yearly, so long as any principal money should remain due on the security of the deed. The petition alleged that on the 6th of March, 1891, the Petitioner applied to the company for payment of the £200, with interest from the 29th of October, 1890, and that, having received no reply to her application, she on the 9th of March, 1891, commenced an action against the company for £205 0*s.* 6*d.*, due to her for principal and interest under the company's covenant, and on the 16th of April she recovered judgment under Order XIV. for £205 16*s.* 6*d.* and costs. She issued execution on the judgment, but the sheriff made a return of *nulla bona*. The petition alleged that the company had ceased to carry on business, and that its registered office had been

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closed since the 25th of March last; that the company's assets were insufficient to meet its liabilities; and that it was insolvent.

The second petition was presented (with notice of the first) on the 28th of May, 1891, by *Paul Krell*, who alleged that he was a judgment creditor of the company for £850 and costs, and that the company had no goods or chattels on which execution could be levied. The petition stated the presentation of Mrs. *Hodge's* petition, and contained the following allegations:—

"*Sarah Eliza Hodge* is the mother of *Baldwin Hodge*, who was one of the vendors of the business acquired by the company, and also one of the first directors of the company. The sum of £200 alleged to have been advanced by *Sarah Eliza Hodge* to the company at 7½ per cent. interest, and in respect of which judgment has been obtained by her, was advanced by her only at the request of certain of the directors of the company, and was not made in pursuance of any resolution of the shareholders in general meeting, or of a duly constituted board of directors, and the security given to her by the company was not so given in pursuance of any such resolution as aforesaid.

"At the time of such alleged advance by the said *Sarah Eliza Hodge*, a sum far exceeding £200 might, if the circumstances of the company had required it, have been obtained by making a call on such of the shares of the company as were not fully paid up.

"The company allowed judgment to go in favour of the said *Sarah Eliza Hodge* by default. No resolution of the board of directors was passed authorizing this course to be adopted.

"The petition of *Sarah Eliza Hodge* has not been *bonâ fide* presented in the interest of the creditors of the company, but has been presented with the privity and consent, if not at the request, of the company, and of certain of the directors thereof, and with a view to protect their interests."

The petition stated that the company had suspended its business for upwards of a year, and that it was unable to pay its debts.

On the 20th of May, 1891, the company passed a resolution, confirming a resolution which had been passed on the 1st of May, to wind up the company voluntarily.

The voluntary liquidator made an affidavit, in which he said that, from information which he had derived from the company's books, he believed that the company's assets (including uncalled capital) would realize considerably more than sufficient to pay 20*s.* in the pound to the creditors.

The total amount due to creditors was about £4700. Calls to the amount of £8535, which had been made on the shareholders, had not been paid.

Gregson, for the first Petitioner, was willing to accept a supervision order.

Cozens-Hardy, Q.C., and *H. B. Howard*, for the second Petitioner:—

A compulsory order ought to be made. A majority of the creditors desire it, and the Petitioner has shewn a case requiring investigation by the Court.

[NORTH, J.:—Even if all the creditors desired a compulsory order, would they be entitled to it, unless they came within the words of sect. 145 of the *Companies Act*, 1862 (1)?]

The *Companies* (*Winding-up*) *Act*, 1890, has made a material difference; the Court has now much larger powers of investigation in a compulsory winding-up than it had under the Act of 1862. Those powers do not exist in a voluntary winding-up under supervision, and this distinguishes the present case from *In re New York Exchange* (2). In that case Lord Justice *Cotton* said (3) "the Court has the same powers under a supervision order as under a compulsory winding-up order." That is not so now, and this affords a reason for making a compulsory order which did not exist before the Act of 1890. That Act has modified the effect of sect. 145 of the Act of 1862.

Napier Higgins, Q.C., and *C. Rose-Innes*, for the Company and the voluntary liquidator.

(1) Sect. 145: "The voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up."

(2) 39 Ch. D. 415.

(3) Ibid. 423.

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Everitt, Q.C., and *Wace*, for creditors and shareholders; *Method*, for a creditor and two shareholders; and *W. Baker*, for ten shareholders; asked for a supervision order.

One shareholder supported the second petition.

NORTH, J.:—

Two petitions have been presented for the winding-up of this company. The first, which was presented by Mrs. *Hodge*, asks for a compulsory order; but she is now willing to take a supervision order. She is a creditor of the company, and, so far as I can see, she is a *bonâ fide* creditor, and, if nothing else had happened, I can see no reason why she would not be entitled either to an order to continue the voluntary winding up under the supervision of the Court, or to a compulsory order. I think there is room for an explanation by the directors of the circumstances under which the loan was made, but Mrs. *Hodge* had nothing to do with that. In my opinion she is entitled to a winding-up order, and, if her petition were the only one, it would be open to her to accept a supervision order, and I should be prepared to make such an order on her petition.

But a second petition has been presented by another creditor for a compulsory order. He presented his petition after the first had come into the paper for hearing, and after he had notice of the proceedings upon it. He says he thought Mrs. *Hodge* might not press for a compulsory order. He was no doubt entitled to present his petition, and, if I thought he had shewn good ground for it, I should have made a compulsory order on his petition. But I am unable to come to the conclusion that he has shewn any ground for a compulsory order. The petition is opposed by other creditors besides Mrs. *Hodge*, who must be taken now to be in favour of a supervision order. The majority of creditors one way or the other is very close, and I do not think it matters which way it is. As regards the shareholders, a large majority desire that the voluntary winding-up should be continued under supervision. Has the second Petitioner established any case for a compulsory order? He has not satisfied me that he will be any better off under a compulsory order. It appears that

£8535 is due to the company in respect of calls which have been made on the shares, but which have not yet been paid. It may be doubtful whether this amount will be fully paid, but at any rate it is probable that a much larger sum will be forthcoming than is required to pay the debts of the company. I am not satisfied that it is to the interest of a creditor that the internal affairs of the company should be investigated by the Court. Such an investigation would have been much more to the purpose if the petition had been presented by a contributory. I cannot see how a creditor would be benefited by it. In my opinion the second Petitioner has not made out any case under sect. 145 of the *Companies Act*, 1862, and that being so, I do not see why, though he is supported by one shareholder, the opinion of such a large majority of the shareholders should be ignored. It is said that by the *Companies* (*Winding-up*) *Act*, 1890, much larger powers of investigation have been given to the Court. But I think the law remains the same as it was under the previous Acts, that to enable a creditor to obtain an order for the compulsory winding up of a company, when there is a voluntary winding-up, he must satisfy the Court that his rights "will be prejudiced" by the voluntary winding-up—that is, that he will suffer by it. If a creditor can make out a case for an investigation of the company's affairs by the Court, there will be a stronger reason now than before the Act of 1890 for making a compulsory order. I do not think that the Petitioner *Krell* has made out such a case. His petition is an experiment, and I must dismiss it with costs. I make a supervision order on Mrs. *Hodge's* petition, which must be amended by stating the dates of the resolutions for voluntary winding-up.

Solicitors: *Clulow & Gould; Budd, Johnson, & Jecks; Rose-Innes, Son, & Crick; Burn & Berridge.*

W. L. C.

NORTH, J.
1891
June 25.

In re CRAWSHAY.
WALKER *v.* CRAWSHAY.

[1890 C. 2814.]

Settlement—Construction—Agreement to settle after-acquired Property—Life Interest subject to Forfeiture on Alienation.

By an agreement in contemplation of marriage the intended husband agreed that he would settle (*inter alia*) the sum of £5000, and any further moneys and property which he should receive and be entitled to under the will of his mother. Under the trusts of the settlement the intended wife was to have the first life interest in the settled funds. The mother afterwards by her will, in exercise of a power of appointment contained in the will of her father, gave to the husband a life interest subject to forfeiture upon alienation or attempted alienation by him:—

Held, that the husband was entitled to this life interest under the will of his mother; that it was not comprised in the agreement for a settlement; and that there had been no forfeiture.

SUMMONS by the trustees of the will of *William Crawshay*, deceased, for the determination of the question, whether the Defendant *C. F. Crawshay*, by virtue of an agreement for settlement dated the 28th of September, 1881, made by him previous to his marriage, or an indenture of settlement dated the 9th of October, 1885, made by him after his marriage, had so assigned or otherwise dealt with his interest in a sum of £15,000 as to cause a forfeiture of all interest therein under the will of his mother, *Jessy Crawshay*, dated the 29th of January, 1885.

William Crawshay, the father of *Jessy Crawshay*, by his will, dated the 21st of October, 1865, bequeathed a sum of £150,000 Consols to trustees, upon trust to pay the income thereof to her for her life, and, after her death, as to the principal sum, upon trust for all and every, or such one or more exclusively of the other or others, of her children or remoter issue in such manner as she should by deed or will appoint, and, in default of appointment, for all her children who being sons should attain twenty-one, or being daughters should attain that age or marry under it with the consent of their parents or guardians, in equal shares.

The will of *Jessy Crawshay* contained a recital of the power of

appointment contained in her father's will, and she then proceeded to make appointments of parts of the sum of £150,000, and (*inter alia*) she appointed that a sum of £25,000 Consols "shall be held upon trust that the trustees or trustee thereof shall (subject to a proviso hereinafter contained) pay the dividends and annual income thereof to my son *A. T. Crawshay* during his life, and after his death upon trust for all and every, or such one or more exclusively of the other or others, of his children, and if more than one, in such shares, and in such manner, as he shall by deed or will or codicil appoint. And, in default of appointment, or so far as any such appointment shall fail to extend, upon trust for all or any his children or child living at my death or born afterwards, who being a son or sons attain the age of twenty-one years, or, being a daughter or daughters attain that age or marry, such children, if more than one, to take in equal shares as tenants in common. Provided always, that no child of the said *A. T. Crawshay* who shall take any part of the same trust premises under any appointment made by him in pursuance of the power in that behalf hereinbefore contained shall, in default of appointment to the contrary, have or be entitled to any share of the unappointed part of the same trust premises, without bringing the share or shares appointed to him or her into hotchpot, and accounting for the same accordingly. Provided also, and I further appoint and declare that if my said son *A. T. Crawshay* shall at any time or times assign, charge, or otherwise dispose of in the way of anticipation the annual income hereinbefore directed to be paid to him during his life, or any part thereof, or by any deed or writing attempt so to do, or shall become bankrupt, or shall have done or committed, or shall hereafter do or commit, any act or thing, or suffer or become subject to any process or circumstances, whether voluntary or involuntary on his part, by reason or in consequence of which the said annual income, if belonging to him absolutely, or any part thereof, would become legally payable to any other person or persons, then and in either of the said cases his life interest shall cease as if he were dead, the subsequent trusts herein declared of the said principal sum of £25,000 Consolidated Annuities being accelerated, and the said annual income during

NORTH, J. 1891 *In re* CRAWSHAY. WALKER *v.* CRAWSHAY.

the remainder of his life (if there shall be no one absolutely entitled to the principal from which the same shall be derived) being paid to or applied for the benefit of the person or persons for the time being presumptively entitled to such principal, according to their respective interests therein." And the testatrix appointed that the principal sum of £15,000 Consols, further part of the £150,000, "shall be held upon trusts for the benefit of my son *C. F. Crawshay* for his life, with remainder to his children, corresponding in all respects with the trusts hereinbefore declared in favour of my said son *A. T. Crawshay* and his children, and subject to the like provision for cesser of the life interest of the said *C. F. Crawshay*, as if all the said trusts and provisions relating to the said *A. T. Crawshay* and his children and otherwise were here repeated, with the substitution only of the name of the said *C. F. Crawshay* for the name of the said *A. T. Crawshay*."

The testatrix died on the 17th of July, 1889. On the 29th of September, 1881, *C. F. Crawshay* married Miss *Emily Howard Cartland*. On the 28th of September, 1881, an agreement was entered into between *C. F. Crawshay* of the first part, Miss *Cartland* of the second part, and *G. H. Cartland* and *J. H. Cartland* (as trustees) of the third part, by which, in consideration of the then intended marriage, it was mutually declared and agreed by and between the parties thereto that, when conveniently might be after the solemnization of the intended marriage, or immediately upon a request in writing to that effect being made after the solemnization of the intended marriage, either by the wife or the trustees, an indenture of settlement should be made and executed whereby a specified sum of £5000, "and any further moneys and property which the said *C. F. Crawshay* shall receive and be entitled to under the will of his mother *Jessy Crawshay*," and some furniture and a policy of assurance on the life of *C. F. Crawshay*, should be conveyed, surrendered, settled, assigned, and assured unto *G. H. Cartland* and *J. H. Cartland*, as trustees, to be held by the trustees in trust for the wife during her life, for her separate use, and from and immediately after her decease in trust for *C. F. Crawshay* during his life, and from and immediately after his decease in trust for the children of the marriage as

therein mentioned, with other trusts in default of children. The settlement of the 9th of October, 1885, was executed to carry out this agreement. There were two children of the marriage, who were infants.

G. Murray, for the Plaintiffs.

Bramwell Davis, for *C. F. Crawshay*:—

There has been no forfeiture of the life interest.

(1.) The life interest is not within the agreement at all, because it comes to *C. F. Crawshay* under the will of his grandfather, not under the will of his mother. The will of the mother by exercising the power of appointment only designates the amounts which each of the members of the class to which the fund is given by the will of the grandfather is to take, but the fund is given to them by his will.

(2.) The agreement does not include life interests at all.

(3.) At any rate, a limited life interest, which would be forfeited if it were comprised in the agreement, is not included in it. It would be absurd to say that such a life interest is within the agreement, when the only result would be to forfeit it, without conferring any benefit by means of the agreement on the objects of the settlement: *Brooks* v. *Keith* (1); *In re Allnutt* (2); *Coventry* v. *Coventry* (3); *Ewart* v. *Ewart* (4); *White* v. *Briggs* (5); *Scholfield* v. *Spooner* (6); *Fry* on Specific Performance (7).

Reginald Winslow, for the infants, was not called upon as to the first point:—

The agreement includes life interests generally: *Scholfield* v. *Spooner*.

C. F. Crawshay was not absolutely incapacitated from dealing with his life interest as in some of the cases cited. The life interest comes within the words of the agreement. In *Brooks* v. *Keith* the *dicta* of Vice-Chancellor *Kindersley* are inconsistent with his decision. In *In re Allnutt* Mr. Justice *Chitty* held

(1) 1 Dr. & Sm. 462.
(2) 22 Ch. D. 275.
(3) 32 Beav. 612.
(4) 11 Hare, 276.
(5) 22 Beav. 176, n.
(6) 26 Ch. D. 94.
(7) 2nd Ed. p. 186.

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that the wishes of the donor could not be taken into account. The forfeiture clause does not render the estate inalienable: *Hurst* v. *Hurst* (1). In *White* v. *Briggs* (2) no reasons were given for the decision, and it cannot be taken to have overruled prior decisions: *Vaizey* on Settlements (3).

NORTH, J.:—

The first point taken is, that the agreement for a settlement does not include the life interest of the husband in the £15,000 in question, on the ground that it was not money which the husband received or became entitled to under his mother's will. It is said that the gift was made to him in exercise of the power given by the grandfather's will to the mother to say how the money coming under his will should go. But the power was a special power, of which her will was an exercise, and, if she had not exercised that special power by her will, the £15,000 would not have gone in this way at all; it would have passed under the limitations in default of appointment contained in the grandfather's will, and would have been outside the agreement. The power was not a general one; it was a special power, and, in my opinion, it is clear that the life interest came to *C. F. Crawshay* under his mother's will, because, if she had not made such a will, the £15,000 would never have come into this channel at all.

Two other points are taken. It is said, first, that the terms of the agreement for a settlement are not such as to include life interests at all; and, secondly, that, even if any life interest is included, the words do not include a life interest which can only continue till the agreement comes into play, and must then cease to exist, so that it cannot pass under the agreement at all. I do not think it necessary to deal with the first of these two points, because, assuming that any life interest would pass under such an agreement, I do not think that a life interest which, if it did pass, would be killed at its birth does pass at all. The proper course, I think, is first to look at the words of the agreement for a settlement. It is an agreement for

(1) 21 Ch. D. 278, 286. (2) 22 Beav. 176, n.
(3) Vol. i. p. 254.

a settlement made in contemplation of marriage, and in consideration of the intended marriage the intended husband agrees that he will (*inter alia*) make a settlement of any further moneys and property which he shall receive and be entitled to under the will of his mother, upon trust for the benefit of the intended wife and the children of the marriage, the first life interest being given to the wife. In my opinion the agreement was intended to secure for the persons who are to be benefited by the settlement something which they would not have had but for its existence. In other words, it was intended to make a settlement upon them, and I do not think its intention or scope was to do more than secure for them anything which legitimately comes within its terms. But the contention is that, as regards this life interest, the effect of the execution of the agreement is, not only not to give anything to the wife and children by virtue of the agreement, but actually to destroy the life interest, though the persons interested under the agreement could not obtain any benefit from that interest or from its destruction. I do not think that such a result is within the scope and object of the agreement. The object of the agreement was to secure that which could be secured to the persons interested under it, but it was not intended to affect or prejudice interests outside the agreement, when the so doing would in no way benefit the persons interested under the agreement. When the agreement had secured to the beneficiaries whatever they could get under it its object was at an end, and it was not intended to destroy or divert an interest which could not be assigned to the beneficiaries under the intended settlement. In my opinion, therefore, the agreement does not apply to the life interest of the husband which he was incapable of assigning. I think this is clear on principle, but I am glad to find that two of the cases which have been cited point in the same direction, and in particular that Mr. Justice *Chitty* adopted the same view in *In re Allnutt* (1). I am glad to have his concurrence in the view which I have taken.

I now come to the will of Mrs. *Jessy Crawshay*, which provides that the trustees are to pay the income of the £15,000 to her

(1) 22 Ch. D. 275.

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son, *C. F. Crawshay*, during his life, and after his death to hold the capital upon trust for his children, subject to this proviso "that if my son shall at any time or times assign, charge, or otherwise dispose of in the way of anticipation the annual income hereinbefore directed to be paid to him during his life, or any part thereof, or by any deed or writing attempt so to do, or become bankrupt," or shall do anything "by reason or in consequence of which the said annual income, if belonging to him absolutely, or any part thereof, would become legally payable to any other person or persons, then, and in either of the said cases, his life interest shall cease as if he were dead, the subsequent trusts being accelerated." What is the meaning of that? She intends that he shall take the income of the fund in such a way that it shall not be capable of alienation by him. It is not her desire that his interest shall be forfeited in a particular event; her desire is that his interest shall be secured to him in that particular event, and, in order to secure it to him, her intention is that he shall be incapacitated from doing anything by virtue of which, if he were taking an absolute interest during his life, some person who is not an object of the trust created by her will would, during her son's life, be receiving some part of the income. That is really the object to which this so-called clause of forfeiture is addressed. The intention was to confine the benefit of the fund to those persons whom the testatrix intended to be the recipients of it, and to prevent any outsider from becoming in any way entitled to the fund. That object will be accomplished if the proviso is so construed as to prevent an agreement to do that which he could not do from being fatal to the gift, and, in my opinion, the true construction is, that, inasmuch as nothing has been done by him by means of which the right to receive the income of this fund can be taken away from him, the forfeiture which the testatrix intended to avoid has not taken place. Under the circumstances I am of opinion that the life interest which the son took in the income of the £15,000 is not divested or put an end to by his execution of this agreement.

Solicitors for all parties: *A. R. & H. Steele.*

W. L. C.

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STIRLING, J.

1891

April 17;
May 2;
June 3.

[1884 J. 64.]

Execution—Judgment against Rural Sanitary Authority—Writ of Elegit—Lands acquired for Purposes of Sewage Disposal—Trust for Contributory Place—"General Expenses"—"Special Expenses"—Stay of Proceedings—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 175, 176, 229–235, 242, 270–275 [*Revised Ed. Statutes, vol. xvii., pp.* 575, 591–5, 597, 606–8]—*Public Works Loans Act*, 1875 (38 & 39 *Vict. c.* 89), *ss.* 28, 36 [*Revised Ed. Statutes, vol. xvii., pp.* 813, 815]—*Public Works Loans Act*, 1878 (41 & 42 *Vict. c.* 18), *s.* 4 [*Revised Ed. Statutes, vol. xviii., p.* 624].

The Plaintiff brought an action against the Defendants, who were a rural sanitary authority, to restrain them from fouling a stream, and in 1885 recovered judgment against them with costs. The costs were not taxed until 1890. In 1891, the costs not having been paid, the Plaintiff sued out a writ of *elegit* under which an inquisition was taken, and the sheriff delivered in execution to the Plaintiff certain lands which had been acquired by the Defendants for the purpose of sewage works for the parish of *N.*, a contributory place within their district, by means of money borrowed on the security of the separate rates of that parish. Upon motion by the Defendants to set aside the writ and inquisition:—

Held, that the lands in question were held by the Defendants on trust for the parish of *N.*, and could only be taken in execution for judgment debts exclusively chargeable against that place; that the costs of the action were "general expenses" not chargeable against that place or the separate rates levied within it, but against the common fund of the district; and that the judgment could only be enforced against property which had been acquired by means of that common fund:—

Held, also, that the writ and inquisition being quite regular, the motion to set them aside was wrong in form; but that under the circumstances the Court would in the exercise of its discretion under sect. 24 (5) of the *Judicature Act*, 1873, order all further proceedings under the writ and inquisition to be stayed.

MOTION and petition.

On the 26th of January, 1885, the Plaintiff obtained judgment in this action, whereby an injunction was granted against certain acts on the part of the Defendant sanitary authority, and they were ordered to pay the costs of the action. The costs were not taxed until the 25th of April, 1890, when the Taxing Master certified them at the sum of £633 2*s.* 10*d.* The costs being

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unpaid, the Plaintiff, on the 7th of August, 1890, obtained a garnishee order *nisi* attaching all debts owing or accruing to the sanitary authority from their treasurer to answer the costs and interest. Two sums of £287 and £302 were sought by this order to be made applicable to the payment of these costs. The sum of £287 was a portion of a poor-rate raised by the overseers in the year 1890, in pursuance of a precept issued by the rural authority; and upon cause being shewn against making the garnishee order absolute, it was held by Mr. Justice *Vaughan Williams*, in October, 1890, on the authority of *Waddington* v. *City of London Union* (1) and *Saul* v. *Wigton Rural Sanitary Authority* (2), that that sum was not available for payment of a debt incurred in 1885. The second sum was the balance of moneys borrowed under the powers conferred by sects. 233 and 242 of the *Public Health Act*, 1875, for the purchase of land for works of sewage disposal within the parish of *Norwood*, a contributory place within the Defendants' district. This sum was also held not attachable to satisfy the Plaintiff's judgment. The garnishee order was therefore discharged, and the costs were ordered to be taxed and set off against the £633 2*s.* 10*d.* due under the judgment. The debt due to the Plaintiff was thus reduced to £595 18*s.* 8*d.*

On the 22nd of January, 1891, the Plaintiff sued out a writ of *elegit* directed to the sheriff of *Middlesex* to enforce payment of his debt, and on the 10th of March, 1891, an inquisition was taken thereunder by which it was found that the Defendants were seised as of fee of certain lands situate in the parishes of *Norwood*, *Hanwell*, and *Isleworth*, containing by admeasurement 19A. 0R. 3P., or thereabouts. The sheriff caused these lands to be delivered in execution to the Plaintiff who presented a petition under the statute, 27 & 28 Vict. c. 112, asking for an order for the sale of the lands, and for the application of the proceeds in satisfaction of what was due to him under the judgment of the 26th of January, 1885.

The Defendants now moved to set aside the writ of *elegit* and the inquisition thereunder, on the ground that the lands in question (which were bought and paid for out of the sum borrowed

(1) E. B. & E. 370. (2) 35 W. R. 252; 51 J. P. 406.

as above mentioned) were held under a special trust for the benefit of the contributory place of *Norwood*, and could not be made available for the satisfaction of the debt due to the Plaintiff.

The money expended in the purchase of the lands in question was borrowed from the Public Works Loan Commissioners, upon the security of a deed of mortgage dated the 10th of February, 1888, and made between the Guardians of the Poor of the *Uxbridge* Union (acting as a rural sanitary authority) of the one part, and *Robert Philpot*, Secretary of the Commissioners for carrying into execution the *Public Works Loans Act*, 1875, of the other part. It recited certain sections of the *Public Health Act*, and then proceeded: "And whereas the Local Government Board, by an instrument in writing bearing date the 14th day of December, 1885, sanctioned the borrowing at interest, by the said rural sanitary authority, of the sum of £6000, for the purchase of land for works of sewage disposal for the said contributory place of *Norwood*, such sum to be borrowed on the credit of the rates, which the said rural sanitary authority were authorized under the *Public Health Act*, 1875, to mortgage for the purpose of securing the repayment of the said sum, together with the interest thereon, and to be repaid with such interest within a period not exceeding fifty years from the date of the borrowing thereof; and the Local Government Board did thereby order and determine that the expenses incurred or payable by the said rural sanitary authority in respect of the works of sewage disposal aforesaid should be deemed to be special expenses within the meaning of the said *Public Health Act*, and should be charged as such upon the said contributory place of *Norwood*. And whereas the said sum of £6000 does not exceed, with the balance of all the outstanding loans contracted by the said rural sanitary authority under the sanitary Acts and the said *Public Health Act*, in respect of the said contributory place of *Norwood*, in the whole the assessable value of two years of the premises assessable within the said contributory place. And whereas the said Public Works Loan Commissioners have, on the application of the said rural sanitary authority, and on the recommendation of the Local Government Board, signified by letter bearing date the 16th of April, 1886, resolved to advance

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to the said rural sanitary authority the sum of £6000 authorized to be borrowed as aforesaid upon having the repayment thereof, with interest at 4 per cent. per annum, by equal half-yearly instalments of principal within a period of fifty years, secured in manner hereinafter appearing. . ." Then the operative part of the deed gave a charge to the Commissioners upon "all the separate rates in the nature of poor rates which shall be made and levied within the said contributory place of *Norwood* under the said *Public Health Act*, and all and every other moneys and rates (if any) which the said rural sanitary authority have power to mortgage for the purposes of this security." The deed also contained the following covenant by the rural sanitary authority: "And it will, when and so soon as the lands required for the said works of sewage disposal as aforesaid, or any part or parts thereof have been purchased, hand over to the secretary for the time being of the Public Works Loan Commissioners, or as he may direct, all and every the title-deeds and other documents relating to such lands, and will, if and whenever thereunto required by the secretary for the time being of the said Commissioners, and at the expense of the said rural sanitary authority, execute to the secretary of the Commissioners, in such form as he may require, a mortgage of the said lands and the works thereon, in pursuance of the powers contained in sect. 235 of the *Public Health Act*, 1875, to secure the repayment of the moneys."

The £6000 advanced on this security was applied to the purchase from the Plaintiff of the lands in question. The purchase-deed was dated the 6th of March, 1888, and was a simple conveyance in fee to the sanitary authority who covenanted, however, that the land should be used "only for the purposes of the outfall works intended to be constructed thereon, in accordance with the scheme of the sanitary authority for draining and disposing of the sewage of the area of the parish of *Norwood*, included in the *Uxbridge* Union," or any necessary modification or improvement of such works, and also that if the said pieces of land or any part thereof should not be used for the purpose of the said outfall works, or if, after having been so used, they should at any time thereafter cease to be so used, or should not be required for such purpose, the sanitary

authority would resell at a price to be determined by arbitration, the said pieces of land or such part thereof as should not be so used or required, to the person or persons for the time being entitled to the *Jersey* settled estates.

On the 30th of May, 1890, the *Middlesex* County Council made an order under the provisions of sect. 57 of the *Local Government Act*, 1888, that the parish of *Norwood* should be converted into and should become a local government district, and be known by the name of the *Norwood* urban district, the order to come into operation on the day when it was confirmed by the Local Government Board. That board, on the 16th of January, 1891, made an order confirming the county council order, but providing as follows: "On and after the day of the first meeting of the local board for the said local government district, all the rights, liabilities, obligations and property, which are attaching to or vested in guardians of the poor of the *Uxbridge* Union acting as a rural sanitary authority, shall, so far as regards the said parish of *Norwood*, pass to and vest in the said local board; but until such day the powers, rights, duties, capacities, liabilities, obligations, and property of the said rural sanitary authority, shall continue to be exerciseable by, attached to and vested in the said authority."

The first meeting of the local board for the *Norwood* urban district did not take place until the 25th of March, 1891, subsequently to the inquisition, and it was not until that date that any property vested in the Defendants passed under the order of the 16th of January, 1891, to the *Norwood* urban district sanitary authority.

Hastings, Q.C., and *A. Macmorran*, for the Defendants:—

The writ of *elegit* and the inquisition which has been taken under it ought to be set aside.

These lands are held by the Defendants in trust for the parish of *Norwood*, having been acquired at the special expense of that parish.

Execution cannot be levied against land of which the debtor is trustee, unless the debt arises in connection with that particular land.

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The Defendants are mere dry trustees of the property, they have no interest in it, and could not sell it, and even if they could, the proceeds would still be held in trust for the parish of *Norwood*. There can be no difference, for this purpose, between the £6000 borrowed on the security of the special rates, and the property which has been purchased with the money so raised. These costs are "general expenses," and should have been paid out of the common fund. Having regard to the provisions of the *Public Health Act*, it is illegal for the Corporation to apply funds dedicated to a particular purpose, in any other way.

[They referred to the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 229–235; *Public Works Loans Act*, 1875 (38 & 39 Vict. c. 89), ss. 28, 36: *Barnes* v. *Harding* (1); *Morris* v. *Jones* (2); *Chitty's* Archbold (3); *Prior* v. *Penpraze* (4); and *Anderson* on Execution.]

Pollard and *Hornell*, for Lord *Jersey*:—

The Plaintiff is entitled to the fruits of his judgment, that is, to execution. The lands in question are not exempt from seizure under a writ of *elegit* merely because they are held for public purposes: *Mersey Docks Trustees* v. *Gibbs* (5); *Coe* v. *Wise* (6); *Worral Waterworks Company* v. *Lloyd* (7); *Doe* v. *Roe* (8), and *Saunders* v. *Slack* (9).

As to the alleged trust for the newly constituted district of *Norwood* the provisional order itself rebuts the presumption founded upon it, because it provides that until the first meeting of the new local board the old authority shall remain in possession.

[STIRLING, J.:—Before the *Judicature Act* the new district of *Norwood* could have come for an injunction.]

Not until it was duly constituted, and that was not till after the inquisition had been held. The new authority takes subject to the liabilities and obligations of the old: *Worral Waterworks Company* v. *Lloyd* (10).

(1) 1 C. B. (N.S.) 568.
(2) 2 B. & C. 242.
(3) 14th Ed. p. 885.
(4) 4 Price, 99.
(5) Law Rep. 1 H. L. 93.
(6) Law Rep. 1 Q. B. 711.
(7) Ibid. 1 C. P. 719.
(8) 1 Q. B. 700, 705.
(9) 11 L. T. (N.S.) 484.
(10) Law Rep. 1 C. P. 721.

[STIRLING, J.:—Suppose a municipal corporation had property vested in it applicable for the purposes of a grammar school, could that property be seized in execution for a general debt?]

The question whether the Plaintiff can hold the property otherwise than subject to the obligation of using it for the particular purpose will arise later. The Court is now asked to set aside the Plaintiff's legal position.

Up to the point when he gets tenancy by *elegit* the Defendants cannot interfere. It is only when he puts into force his remedy that they can come for an injunction. The motion is still premature.

[STIRLING, J.:—Cannot the new authority intervene under sect. 24, sub-s. 5, of the *Judicature Act*, 1873?]

If they do, we shall be in a position to meet them. At present it is the Defendants who are applying to set aside the writ and inquisition which are all in order. They shew no ground for doing so.

[STIRLING, J.:—What difference is there between the land, and the money with which it was purchased, which, according to the decision of Mr. Justice *Vaughan Williams*, you could not touch?]

We ought not to be called upon to argue that question on this motion.

Hastings, in reply:—

The real question is whether these are not lands which the Plaintiff is not entitled to extend.

That question is not touched by the cases relied upon by the Plaintiff. The point is whether the Plaintiff can seize lands for a debt not in any way connected with them. Property appropriated for a particular purpose cannot be taken in execution for a general debt.

[He also referred to *Hughes* v. *Lumley* (1).]

STIRLING, J.:—

I shall direct the notice of motion and petition to be served upon the *Norwood* Local Board, and the case will stand over for

(1) 4 E. & B. 274.

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a week in order that the new authority may be properly represented.

May 2. *Buckley*, Q.C., and *Marcy*, for the *Norwood* Local Board:—

These proceedings ought to be stayed.

[STIRLING, J. (after referring to the *Judicature Act*, 1873, s. 24, sub-s. 5):—The Defendants say they are trustees for you only. If that is so, these proceedings would seem to be an abuse of the process of the Court. If you desire to add anything I will hear you.]

Pollard and *Hornell*, for Lord *Jersey*:—

It is argued against us that the old authority or whatever authority is in possession of the land for sewage purposes, holds the land under a special trust. The position of the old authority was under the provisional order maintained intact in all respects until a certain event. The only effect of the provisional order was to substitute one authority for the other. So soon as the new authority was constituted and the order became operative, the new authority took the rights and obligations of the old authority by substitution: *Public Health Act*, 1875, ss. 270–275. It would be doing violence to the Act to hold that there is a trust in favour of the new body until the event happens which is to bring it into existence. Under sect. 273 the order might have been appealed against and never confirmed. There is nothing to create a trust in favour of the inchoate authority. There is only the substitution of one body for the other as expressly provided by the Act. The provisional order did not come into operation until the 25th of March, whereas the lands were delivered in execution under the *elegit* on the 10th of March. There is nothing to create a trust for any contributory or other district.

[They also referred to sects. 175 and 176 of the *Public Health Act*, 1875, and to *Sanitary Commissioners of Gibraltar* v. *Orfila* (1); the *Public Health Act*, 1875, ss. 6, 12, and 218, and to the *Public Works Loans Act*, 1878 (41 Vict. c. 18), s. 4.]

(1) 15 App. Cas. 400.

Hastings, in reply:—

These costs are general expenses under sect. 229 of the *Public Health Act*, 1875, and do not constitute a debt of the *Uxbridge* authority in respect of the *Norwood* district.

1891. June 3. STIRLING, J. (stated the facts, and continued):—

It appears that on the 10th of March, 1891, the Defendant rural sanitary authority was entitled to the land in question in fee, subject to the equitable charge in favour of the Public Loans Commissioners created by the covenants in the deed of the 10th of February, 1888, and subject to an obligation arising under the *Public Health Act*, 1875, and the orders of the Local Government Board to use the lands for works of sewage disposal for the contributory place of *Norwood*, and subject also to the covenants in the deed of the 6th of March, 1888, which enure for the benefit of the Plaintiff and his successors in title, and may for the present purpose be disregarded. Two questions arise, one of substance—viz., whether the Defendant sanitary authority or the *Norwood* authority has any interest in the lands in question which can properly be made available for satisfaction of the Plaintiff's judgment debt; and one of form—viz., whether, if the former question be answered in the negative, the Defendants were right in bringing forward the case on motion. First, as regards the question of substance, on behalf of the Plaintiff, it was contended, on the authority of *Mersey Docks Trustees* v. *Gibbs* (1); *Coe* v. *Wise* (2), and *Worral Waterworks Company* v. *Lloyd* (3), that the lands in question were not exempt from seizure under an *elegit* merely on the ground that they were held for public purposes. This was not disputed on the other side, but it was said that these lands were held by the Defendants on a public trust of a special nature, such that they could not be taken in execution for the Plaintiff's debt, any more for example than lands vested in a municipal corporation for the maintenance of a grammar school or an almhouse could be taken in execution to satisfy an

(1) Law Rep. 1 H. L. 93. (2) Law Rep. 1 Q. B. 711.
(3) Law Rep. 1 C. P. 719.

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ordinary debt of the corporation. The argument for the sanitary authorities was mainly based on the provisions of the *Public Health Act*, 1875, contained in the group of sections (229–232) headed "Expenses of Rural Authority." By sect. 229 general expenses (under which head the costs in question fall) are "to be payable out of a common fund to be raised out of the poor rate of the parishes in the district, according to the rateable value of each contributory place," in manner mentioned in the Act. Special expenses include the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the charges and expenses arising out of or incidental to the possession of property transferred to the rural authority "in trust for any contributory place," and all other expenses incurred by or payable by the rural authority in or in respect of any contributory place within the district, and determined by the Local Government Board to be special expenses. It is provided that where the rural authority make any sewers, or execute any other work for the common benefit of any two or more contributory places within their district, they may apportion the expense of constructing any such work and maintaining the same in such proportions as they may think fit between the contributory places, and any expense so apportioned for any such contributory place is to be deemed to be special expenses legally incurred in respect of such contributory place. All special expenses are to be a separate charge on each contributory place. Section 230 prescribes the mode of obtaining payment from the several contributory places within a district—viz., by issuing a precept to the overseers of each such place, and it is expressly directed that care is to be taken to issue separate precepts in respect of contributions for general expenses and special expenses or to make such expenses respectively separate items in any precept including both classes of expenses. The overseers are to comply with the requisitions of such precept by paying the contribution in respect of general expenses out of the poor rate of their respective parishes, and by raising the contribution required for special expenses by the levy of a separate rate in manner prescribed. The overseers are, at the expiration of their term of office, to pay any surplus arising

from such separate rate, above the amount required under the precept of the rural authority to the credit of the contributory place for which such rate was made, and such surplus is to go in reduction of the next call that may be made on such contributory place for the purpose of defraying the expenses incurred by the rural authority. By sect. 233 a rural authority is authorized to borrow any sums applied or intended to be applied for general expenses on the credit of the common fund out of which such expenses are payable, and any sums applied or intended to be applied for special expenses on the credit of any rate or rates out of which expenses are payable, and by way of security to mortgage such fund, rate, or rates. It appears, therefore, that the funds from which general expenses and special expenses are to be paid are carefully distinguished, the former being payable out of a fund common to all the parishes of the district, the latter out of a special rate levied in the particular contributory place. If recourse has to be had to borrowing, the authority may borrow for general expenses on the credit of the common fund, and for special expenses on the credit of the special rate. It seems to follow from the scheme of the Act that no part of the fund devoted to special expenses can be applied to general expenses and *vice versâ*. If this be so, it would seem to follow that no property which has arisen from the fund devoted to special expenses can be applied to general expenses or *vice versâ*. Otherwise special expenses would indirectly be thrown on a fund not applicable for payment of them, and *vice versâ*. There is, it is true, no explicit enactment as to the trusts upon which lands or property acquired by means of money raised for special expenses are to be held, but sect. 229 speaks of "property transferred to the rural authority in trust for any contributory place"; and it seems to me that land which has been bought out of moneys which are a charge on a contributory place, and on that contributory place alone, and has been conveyed to the authority for a purpose limited as regards its benefits to that contributory place, must be taken to be property transferred in trust for that place and no other. In opposition to this view the Plaintiff's counsel called attention to the language of sect. 175, as to the disposal of the proceeds of

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sales of surplus lands which are to be applied "towards discharging by means of a sinking fund or otherwise any principal moneys which have been borrowed by such authority on the security of the fund or rate applicable by them for the general purposes of this Act, or, if no such principal moneys are outstanding, shall be carried to the account of such fund or rate." The words "general purposes" were referred to as shewing that the proceeds of sale might be carried to the credit of the fund out of which general expenses are payable, but it seems to me that the language does not necessarily lead to this conclusion. The rate levied for special expenses is applicable for the general purposes of the Act so far as regards the contributory place in which it is levied. It could hardly be disputed that in the present case the proceeds of sale might be applied in paying off the mortgage of the 10th of February, 1888, which is charged on the rates of the parish of *Norwood*, and if this be so, then under sect. 175, in the absence of any charge, the proceeds would have to be carried to the credit of the same rate. Again, by sect. 235, it is provided that when any local authority—*i.e.*, whether urban or sanitary—are possessed of any lands, works, or other property for the purpose of disposal of sewage, they may borrow any moneys on the credit of such lands, works, or other property, and may mortgage such lands, works, or other property to any person advancing such moneys in the same manner in all respects as if they were the absolute owners at Law and in Equity of the lands, works, and other property so mortgaged. The clause then proceeds:—"The moneys so borrowed shall be applied for purposes for which money may be borrowed under the Act." The language of the section is "purposes," not "any of the purposes," for which money may be borrowed. The purposes for which money may be borrowed under the Act are defined by sect. 233, and include both general and special expenses. In exercising the power conferred by sect. 235, it seems to me, a rural sanitary authority would be bound to have regard to the distinction drawn by the Act between the two classes of expenses, which distinction is specially recognised in sect. 233. I think, therefore, that the lands in question were held by the Defendant sanitary authority, not for the sanitary district gene-

rally, but for the contributory place of *Norwood*, and that they can only be taken in execution for judgment debts exclusively chargeable against that contributory place. The costs in this action are not so chargeable against that place or the separate rates levied within it under sect. 230, but against the common fund of the district; and the Plaintiff's judgment can, as it seems to me, be enforced only against property which has been acquired by means of that common fund. The decision in this very action of Mr. Justice *Vaughan Williams* as to the £302, supports this conclusion. It follows from that decision that no part of the £6000, borrowed from the Public Works Loan Commissioners, could have been taken in execution, and applied in payment of these costs. It would be a most singular result if the land which was bought by means of that sum and which now, in fact, represents the greater part of it, could be so taken in execution and applied. It was, indeed, said that the ground of the decision was the power of the Local Government Board to enforce the application of the fund by means of *mandamus*. No doubt it is true that the Local Government Board have power conferred by 41 Vict. c. 18, s. 4, to enforce the application of the fund by *mandamus*, and that power is referred to in the judgment of the learned Judge; but I think the decision was really based on the provisions of 38 & 39 Vict. c. 89, ss. 35, 36; 41 Vict. c. 18, s. 4, and 44 & 45 Vict. c. 38, s. 9, which regulate the application of money borrowed from the Public Loan Commissioners. Independently of the special remedy conferred by 41 Vict. c. 18, s. 4, I apprehend that an action might have been brought by the Attorney-General *ex officio*, or at the relation of an interested party, to restrain the authority from misapplying the funds. (See *The Attorney-General* v. *Daniel* (1).) It is no doubt to be regretted that the Plaintiff should encounter so many difficulties in obtaining payment of what is justly due to him, but I must point out that these have been largely occasioned by the delay —a delay of which no explanation has been given—in the taxation of the costs. There seems no reason why they should not have been taxed within a few weeks of the judgment, in which case they would in ordinary course have been paid out of the

(1) 9 L. J. (Ch.) 394.

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rates of the then current year. The difficulty is all the greater that a change has taken place in the *status* of the contributory place of *Norwood*. Under sect. 295 of the *Public Health Act*, 1875, the order made by the Local Government Board is final and conclusive, and there seems to be no mode in which the accounts between the contributory district and the Defendant sanitary authority can now be adjusted.

I now turn to the question of form. I think that the notice of motion as it was served cannot be supported. The writ of *elegit* and the inquisition taken thereunder, appear to me to have been quite regular. I think, however, that under sect. 24, sub-sect. 5, of the *Judicature Act*, 1873, the Court has power (in the view which I take of the rights of the parties) to direct a stay of proceedings. I think it was competent for the Defendant sanitary authority to bring the facts as to the mode in which the property had been acquired under the notice of the Court by a motion. I will, therefore, allow the notice of motion to be amended by asking for a stay of proceedings. I propose to make one order on the motion and petition as follows:—The Court being of opinion that the lands in the inquisition mentioned were held by the Defendant sanitary authority in trust for the contributory place of *Norwood* within the district of the Defendant sanitary authority, and are not liable to be taken in execution for the judgment debt of the Plaintiff, order that all further proceedings under the writ of *elegit* and inquisition in the notice of motion mentioned be stayed. I make no order as to the costs of the motion; but the petition I dismiss with costs.

Solicitors: *Gamlen & Burdett*, agents for *Woodbridge & Sons, Uxbridge; Freshfields; A. L. Houlder.*

G. A. S.

STIRLING, J.
1891
April 22; June 20.

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[1879 M. 111.]

Will—Bequest to a Class—Vested or Contingent Gift—Period of ascertainment of Class—Remoteness.

A testator by will dated in 1848 gave his real and residuary personal estate upon trust for sale, conversion and investment, and after giving certain annuities directed his trustees to hold the investments and the income thereof "upon trust to pay and divide the same equally between the children of my son *J. M.*, viz., *R. P. M.*, *E. W. M.*, *M. H. M.*, *A. W. M.*, *J. W. M.* and any other children who may hereafter be born, as and when they shall respectively attain the age of twenty-five years," and the testator gave his trustees power "in the meantime to pay and apply the whole or any part of the remainder of the income of the investments for the maintenance and education of such grandchildren during their minority;" and also "to pay and apply for the benefit or advancement of his said grandchildren or any of them any part not exceeding one-half of the capital to which they or he may be entitled expectant on their, his, or her attaining the age of twenty-five years."

At the testator's death in 1879, his son *J. M.* had five children living; one child of *J. M.*'s was born four months after the testator's death, and two more were subsequently born; all of which children were still living. The eldest child of *J. M.* attained the age of twenty-five in January, 1890:—

Held (1) that the children of *J. M.* did not take vested interests; (2) that the gift was a gift to a class which must be ascertained when the first of the children of *J. M.* attained twenty-five, and (3) that the gift was void for remoteness.

Adjourned summons.

The question raised by this summons was whether a bequest in the will of the testator, *John Peter Mervin*, in favour of the children of the testator's son, *John Mervin*, was void for remoteness.

The testator by will, dated the 1st of October, 1848, gave his real and residuary personal estate to trustees upon trusts for sale, conversion and investment, and directed his trustees to stand possessed of the investments and the annual income thereof upon trust to pay to his son *John Mervin* £100 a year during his life, and if he should die leaving a widow, upon

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trust to pay to her the like sum during her life or widowhood, and upon further trust to set apart a sufficient sum to produce the annual income of £40 to be applied as in the will mentioned, and upon further trust to pay an annual allowance of £260 to *Amelia Sarah Patterson* during such period as therein mentioned. The will then proceeded: "Subject to the hereinbefore bequests, I direct my trustees to stand possessed of the said investments, and the annual income and produce thereof upon trust to pay and divide the same equally between the present children of my said son *John Mervin*, viz., *Richard Peter Mervin*, *Elizabeth Wilson Mervin*, *Mary Harriet Mervin*, *Arthur Wilson Mervin*, *John William Mervin*, and any other children who may hereafter be born, as and when they shall respectively attain the age of twenty-five years, with power to my said trustees in the meantime to pay and apply the whole or any part of the remainder of the income of the said investments for the maintenance and education of such grandchildren during their minority, and also with full power for my trustees in their absolute discretion to advance, pay, or apply to or for the benefit and advancement in the world of my said grandchildren, or any of them, any part not exceeding one-half of the capital to which they or he may be entitled expectant upon their, his, or her attaining the age of twenty-five years."

The testator died on the 4th of March, 1879, leaving his son *John Mervin* him surviving. At the testator's death *John Mervin* had five children living. One child, then *en ventre sa mere*, was born four months after the testator's death, and two more were subsequently born. All these children were still living. *Richard Mervin*, the eldest of *John Mervin's* children, attained twenty-five in January 1890, and in June 1890, he took out a summons in this action, which was for the administration of the testator's estate, asking that his share of certain funds in Court to the credit of the action might be paid out to or appropriated for him. There was a difficulty in ascertaining who were the next of kin of the testator, and by an order of the 15th of December, 1890, the Attorney-General was ordered to represent those next of kin for the purpose of arguing the question raised by the summons, which was now adjourned into Court.

Warrington, for the five children living at the testator's death and the child then *en ventre sa mere*:—

The first question is whether the children of *John Mervin* took vested or contingent interests under the will, and I contend that they took vested interests. No doubt the terms of the bequest to the then present and thereafter born grandchildren of the testator "as and when they shall respectively attain the age of twenty-five years," are *primâ facie* contingent; but there is a power given to the trustees in the meantime to pay and apply the income of the trust fund for their maintenance and education and also a power of advancement, and these shew the intention of the testator that the shares of the grandchildren should be vested: *Eccles* v. *Birkett* (1); *Fox* v. *Fox* (2); *Davies* v. *Fisher* (3); *Harrison* v. *Grimwood* (4); *Re Mitchell. Mitchell* v. *Yarrow* (5).

This is the case of a gift of residue, without a gift over. It was the intention of the testator that only those grandchildren who were living at his death should take, and if it is a gift to a class the class must be ascertained at the death of the testator: *Elliott* v. *Elliott* (6); *In re Coppard's Estate* (7). It is not, however, as to any of these grandchildren a gift to a class, because as each child of *John Mervin* "respectively" attains twenty-five he is entitled to be paid a proportionate part without reference to the question whether the other children are entitled or not; and my contention is that the shares are ascertained when any child attains twenty-five, and that the gift is good as to the children whom I represent: *Wilkinson* v. *Duncan* (8).

W. C. Druce, for the two children of *John Mervin* who were born after the death of the testator:—

Upon the authority of *Fox* v. *Fox* this is a gift to a class the members of which attain vested interests either at the death of the testator or at their birth, subject to this, that as the class must be ascertained when the eldest child attains twenty-five,

(1) 4 De G. & Sm. 105.
(2) Law Rep. 19 Eq. 286.
(3) 5 Beav. 201.
(4) 12 Beav. 192.
(5) Chitty, J., December 18, 1889, unreported.
(6) 12 Sim. 276.
(7) 35 Ch. D. 350.
(8) 30 Beav. 111, 116.

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that event must take place within the legal limits of time. Here the eldest child attained twenty-five within eleven years after the testator's death; the two younger children were then living, and as the period of distribution is not too remote, they are included in the class and entitled to share.

Ingle Joyce, for the Attorney-General, as representing the next-of-kin of the testator:—

This is a clear case of a gift to a class; and although as soon as any one of the children of *John Mervin* attains twenty-five the maximum number of the class is ascertained, the first child to attain twenty-five might be one born after the testator's death, and the period of distribution might be beyond the legal limits. The case is quite different from *Elliott* v. *Elliott* (1), and the gift is void for remoteness. *Primâ facie* it is a contingent gift to a class as and when they shall respectively attain twenty-five; and it is not the income of each share that the trustees are empowered to apply for maintenance, but the income of the whole fund. Again, the words of the gift are "equally between the present children . . . . and any other children who may hereafter be born," emphatic words which cannot be restricted to birth in the testator's lifetime, especially where as here the period of distribution is not until some child attains twenty-five.

Warrington, in reply, referred to *Butler* v. *Lowe* (2); *In re Wenmoth's Estate* (3), and *Pearks* v. *Moseley* (4).

1891. June 20. STIRLING, J. (after stating the facts of the case, continued):—

The rule which must guide me in deciding the questions in this case is thus stated by Lord *Selborne* in *Pearks* v. *Moseley*, "The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner

(1) 12 Sim. 276.
(2) 10 Sim. 317.
(3) 37 Ch. D. 266.
(4) 5 App. Cas. 714, 719.

as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law."

The first question raised in the present case was whether the children of *John Mervin* took vested or contingent interests.

It was not disputed that the trust to "pay and divide between the present children" of the son "and any other children who may hereafter be born as and when they shall respectively attain the age of twenty-five years," if it stood alone would confer contingent interests only on the children; but it was contended that the power to the trustees in the meantime to pay and apply the whole or any part of the remainder of the income for the maintenance of such grandchildren during their minority was sufficient to vest the shares of the children; and in support of that contention *Fox* v. *Fox* (1) and other cases of the same class were relied on.

In *Fox* v. *Fox*, the testator gave the investments of one-fifth of £15,000 to trustees upon trust to pay the income to his son for life, and after his death to his widow during widowhood, and after her death or second marriage to divide and transfer the one-fifth of the £15,000 to and amongst the children of the son equally as they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof respectively as the trustees or trustee for the time being should think proper, to and for his and her maintenance and education until such share should become payable as aforesaid. Sir *Geo. Jessel*, M.R., held that the children of the testator's son took vested interests. There, however, the fund was divided into as many shares as the son had children, and the income of each share was directed to be

(1) Law Rep. 19 Eq. 286.

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applied for the maintenance of the particular child for whom the share was destined. Here the income of the whole fund is made applicable for the maintenance of all the children. Now in *In re Parker* (1), the testatrix gave her residuary estate to trustees upon trust to pay the income or such part thereof as her trustees should deem expedient in the maintenance and education of her children until they should attain their respective ages of twenty-one years: and from and after their attaining their respective ages of twenty-one years upon trust to pay, assign, and transfer the estate unto her said children in equal shares. There Sir *George Jessel* held that the children did not take vested interests. He distinguished *Fox* v. *Fox* (2), and said, "It appears to me that this case is different from that of *Fox* v. *Fox*. In my opinion, when a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit.' But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age." I think that applies to the present case, and consequently that the children of *John Mervin* did not take vested interests.

There was some suggestion that the gift was not one to a class. I am unable to accede to this view; if authority on this point be required, I refer to *In re Jackson* (3). This being so, the question arises at what period the class is to be ascertained.

Where a will contains an immediate gift to the children of a living person, and nothing more, and there are children living at the death of the testator those children only take: *Viner* v. *Francis* (4); *Davidson* v. *Dallas* (5). If, however, the period of distribution is postponed, the gift will apply not only to the

(1) 16 Ch. D. 44, 45.
(2) Law Rep. 19 Eq. 286.
(3) 25 Ch. D. 162.
(4) 2 Cox, 190.
(5) 14 Ves. 576.

children living at the death of the testator, but also to those born before the period of distribution, *Andrews* v. *Partington* (1), *In re Emmet's Estate* (2), those living at the death of the testator taking vested interests liable to be divested *pro tanto* by the birth of each additional child: *Oppenheim* v. *Henry* (3); *Baldwin* v. *Rogers* (4). In *Andrews* v. *Partington*, the bequest was to the children of *A.*, the daughters' shares to be paid at twenty-one or on marriage; and the sons' shares at twenty-one. It was, therefore, a case where the gift and direction as to payment were distinct. The same rule has been applied in cases where the gift was contingent. In such cases all who come into existence before the first member attains a vested interest will (if the contingency is satisfied as regards them) be entitled to share: *Whitbread* v. *Lord St. John* (5); *Gilbert* v. *Boorman* (6); *Clarke* v. *Clarke* (7); *Gillman* v. *Daunt* (8). In the present case the gift is contained in the direction to pay and divide, and according to this rule the class would be ascertained when the first child of *John Mervin* attained twenty-five.

It was, however, contended that the class was to be ascertained at the death of the testator; and in support of this contention two cases were cited: *Elliott* v. *Elliott* (9); and *In re Coppard's Estate* (10).

In *Elliott* v. *Elliott*, the testator gave a legacy of £1000 to his daughter *Elizabeth Elliott*, and all other his personal estate and effects, unto and among all or any the children, sons and daughters, of his said daughter, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years; and he directed the interest on their respective shares to be accumulated, and to be paid to them as and when the principal should be payable. The Vice-Chancellor held that the gift was to such of the children of the testator's daughter as were living at his death. The judgment is as follows:—

"I see no objection, in principle, to holding that, by the

(1) 3 Bro. C. C. 401.
(2) 13 Ch. D. 484.
(3) 10 Hare, 441.
(4) 3 D. M. & G. 649.
(5) 10 Ves. 152.
(6) 11 Ves. 238.
(7) 8 Sim. 59.
(8) 3 K. & J. 48.
(9) 12 Sim. 276.
(10) 35 Ch. D. 350.

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description: 'All and every the children, sons and daughters of my daughter *Elizabeth Elliott*,' the testator meant those children who were then living or might be living at his death; and then there is no objection to the gift. Where a testator speaks of the children of his daughter, the reasonable construction is that he means such children as his daughter has at his death, at which time the will speaks."

The Vice-Chancellor does not refer to the attainment of the age of twenty-two. No notice is taken of the rule established by such cases as *Andrews* v. *Partington* (1) and *Whitbread* v. *Lord St. John* (2), which had been followed by the same Vice-Chancellor in *Clarke* v. *Clarke* (3). It is to be observed, however, that the will contained a direction that the interest on the respective shares of the children should be accumulated and paid to them as and when the principal should be paid. It may be that it was considered that the children of *Elizabeth Elliott* took vested interests at the death of the testator, and that the case fell within the previous decision in *Kevern* v. *Williams* (4). However this may be, I think that the direction as to interest distinguishes *Elliott* v. *Elliott* (5) from the present case.

As regards *In re Coppard's Estate* (6), it purports to be based on *Elliott* v. *Elliott*, and I am sure was not intended to go beyond it.

I come to the conclusion, therefore, upon the ordinary rules of construction, that the class to take is to be ascertained when the first of the children of *John Mervin* attained twenty-five.

Now, in applying the rules against perpetuity, the period of time to be regarded is the death of the testator; and it is to be observed that in this respect the rule in *Andrews* v. *Partington* may operate not unfavourably to the validity of such gifts as are here in question. Thus, when a testator gives his estate to the children of his daughters who should attain twenty-five, and at his death one of the daughters had a child who had attained twenty-five, it was held that the class to take was to be ascertained at the death of the testator, and consequently, that the

(1) 3 Bro. C. C. 401.
(2) 10 Ves. 152.
(3) 8 Sim. 59.
(4) 5 Sim. 171.
(5) 12 Sim. 276.
(6) 35 Ch. D. 350.

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gifts were valid : *Picken* v. *Matthews* (1). Here, however, at the death of the testator none of the children of *John Mervin* had attained twenty-five ; all those then living might have died without attaining twenty-five, so that it might have happened that the class to take was not ascertained until after the expiration of a life or lives in being and twenty-one years afterwards, that is beyond the limit allowed by the rule against perpetuities.

In my judgment the gift according to the rule established by *Pearks* v. *Moseley* (2) is void for remoteness, and there must be a declaration accordingly.

Solicitors : *Crossman & Prichard ; Hare & Co.*, agents for the *Solicitors to the Treasury.*

(1) 10 Ch. D. 264. (2) 5 App. Cas. 714.

W. W. K.

KEKEWICH, J.

1891

June 5, 6, 9.

GRIGG *v.* NATIONAL GUARDIAN ASSURANCE COMPANY.

[1891 G. 1060.]

Bill of Sale—Chattels—Furniture—"Delivery Order"—Immediate Possession—Pledge—Registration—Bills of Sale Act, 1878, *ss.* 3, 4 [*Revised Ed. Statutes, vol. xviii., p.* 651]—*Bills of Sale Act*, 1882, *s.* 8.

The Plaintiff applied verbally to the Defendants for a loan, offering as security certain furniture of his then at a warehouse in his name. The Defendants made the loan to the Plaintiff, who gave them a promissory note for the amount, and also signed a memorandum by which he agreed to pay interest on the amount of the note if not paid by the stipulated time. On the same day the Plaintiff signed and handed to the warehouseman a delivery order, requesting him to "deliver" to the Defendants or their order "all property warehoused with you in my name on payment of your charges":—

Held, that the delivery order was not a "bill of sale" within the *Bills of Sale Acts*, 1878 and 1882, the whole transaction being one of pledge, and the effect of the delivery order being equivalent to actual possession by the Defendants, the pledgees.

IN May, 1890, the Plaintiff made a verbal application to the Defendants, the *National Guardian Assurance Company, Limited*, for an advance of £250, to pay off a loan to Messrs. *Attenborough*, of *Shaftesbury Avenue, London*, offering as security certain furniture and effects of his upon which Messrs. *Attenborough* had a charge or lien, but which were at the time warehoused at *Taylor's Depository, Pimlico*, in the Plaintiff's name. The Defendant company thereupon advanced the £250 to the Plaintiff, who paid off Messrs. *Attenborough*, and gave the company a promissory note for the amount of the advance, with a further sum for interest, the note being dated the 12th of May, 1890, and payable in fourteen days.

On inquiry the same day at *Taylor's Depository*, the company were informed by the proprietors that there was a sum due to them for warehousing charges in respect of the goods, and they refused to transfer the goods into the company's name until that sum was paid.

At the Plaintiff's request, and on his giving them a further

promissory note to cover that sum, the note being dated the same day, the 12th of May, and payable within fourteen days, the company paid Messrs. *Taylor*.

The Plaintiff then signed and handed to Messrs. *Taylor* the following order for delivery of the goods to the company's secretary, *Thomas James Bourne*:—

"Order to Deliver.

"To

"Messrs. *Walter Taylor & Sons*,

"*Taylor's Depository, Pimlico.*

"Deliver to Mr. *Thomas James Bourne* or his order all property warehoused with you in my name on payment of your charges.

John W. Grigg.

Stamp 1*d.*

"May 12, 1890."

On handing each of the two promissory notes to the company, the Plaintiff signed a memorandum of agreement—each memorandum being dated the 12th of May, 1890—for payment of interest in case of default in payment of the amount of the note by the stipulated day. The memorandum referred to the note by date and amount, but contained no reference whatever to the fact that the furniture was to constitute part of the security.

The Plaintiff having made default in payment of the promissory notes and interest, the company, after fruitless applications for payment, instructed a firm of auctioneers to sell the furniture, which was accordingly removed for that purpose by the company's secretary, under the authority of the delivery order, from *Taylor's Depository* to the auction rooms, and was advertised to be sold on the 21st of May, 1891, the company's claim for balance of principal money and interest, and for further warehousing charges at *Taylor's*, being £346 16*s.* 9*d.*

Thereupon the Plaintiff issued the writ in this action, and now moved for an injunction to restrain the Defendants, the company and their secretary, from selling or otherwise dealing with the furniture.

KEKEWICH, J.

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On the hearing of the motion the Plaintiff admitted the amount of the company's claim, but insisted that the furniture was of far greater value, and desired an extension of time to raise the sum claimed. He also asserted that the company had no legal right to sell the furniture at all.

By consent the hearing of the motion was treated as the trial of the action.

Minton-Senhouse, for the Plaintiff:—

I submit that the delivery order gave the Defendants the right to take possession of the goods. They could not otherwise have taken possession. It was their document of title to the goods, and therefore ought to have been registered as a bill of sale within the meaning of the *Bills of Sale Acts*. By sect. 8 of the *Bills of Sale Act*, 1882, a bill of sale is void, as to the chattels comprised in it, unless registered; and the *Bills of Sale Act*, 1878, s. 3, applies to every bill of sale whereby the holder or grantee has power, either immediately or at any future time, to seize or take possession of chattels: by sect. 4 the expression, "bill of sale," includes "authorities or licences to take possession of personal chattels as security for any debt." This delivery order is a licence to take immediate possession of goods, and therefore a bill of sale: *Ex parte Parsons* (1); *Mills* v. *Charlesworth* (2). *Ex parte Close* (3), and *In re Cunningham & Co.* (4), which may be cited against me, were disapproved of in *Ex parte Parsons*. Moreover, the facts in those cases were different from those here.

Warmington, Q.C., and *Dundas Gardiner*, for the Defendants:—

Apart from any authority we say that this delivery order is within the very terms of the exception in sect. 4 of the *Bills of Sale Act*, 1878, for it is, as expressed on the face of it, an "order for the delivery of goods;" or it may be described as a "document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to

(1) 16 Q. B. D. 532.
(2) 25 Q. B. D. 421.
(3) 14 Q. B. D. 386.
(4) 28 Ch. D. 682.

authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." It is not a document constituting any part of our title to the goods, for that title depended entirely on the verbal contract. As to the authorities, in *Ex parte Parsons* (1) the document was an agreement for a loan on security, and therefore expressly within the first part of sect. 4 of the *Bills of Sale Act*, 1878. In that case the Court of Appeal, while not agreeing with the *ratio decidendi* in *Ex parte Close* (2), held nevertheless that the case "was obviously rightly decided, because the document there in question was one of those which are excepted by the proviso at the end of sect. 4 of the Act of 1878, and for that reason it was not within the Act." The transaction in *Ex parte Close* was one of "pledge," the essence of which is that possession is transferred at once, and it was held that a transaction of that nature was not within the *Bills of Sale Acts* (3). So in the present case the transaction is one of pledge, transferring the right of immediate possession of the goods, the delivery order being the key by which we, the pledgees, can unlock the door and obtain physical possession, as in *Hilton* v. *Tucker* (4). The form of the delivery order in this case operates to transfer possession much more strongly than that in *Ex parte Close*. The document in *In re Cunningham & Co.* (5), a wharfinger's warrant, was, no doubt, clearly within the exception in sect. 4 of the Act of 1878, but there Mr. Justice *Pearson* agrees with what Mr. Justice *Cave* said in *Ex parte Close*, namely, that the *Bills of Sale Acts* are not intended to refer to cases in which the possession of goods is immediately given to the grantee. Again, *Ex parte Hubbard* (6) is an authority that a transaction by way of pledge giving the possession of goods is not a "bill of sale." If, after a contract of pledge, a document is signed shewing the terms of the pledge, such document is not a "bill of sale": *Ex parte Hubbard*; *Hilton* v. *Tucker*. The delivery order cannot be put on a higher footing than such a document, or than the receipt which, in *Newlove* v. *Shrewsbury* (7), was held not to be a bill of sale.

(1) 16 Q. B. D. 532, 545.
(2) 14 Q. B. D. 386.
(3) 14 Q. B. D. 392, 393.
(4) 39 Ch. D. 669.
(5) 28 Ch. D. 682.
(6) 17 Q. B. D. 690, 697, 699.
(7) 21 Q. B. D. 41.

KEKEWICH, J. 1891 GRIGG v. NATIONAL GUARDIAN ASSURANCE COMPANY.

The order was merely for the protection of the warehouseman against a demand by the Plaintiff, and cannot therefore operate as an "assurance of personal chattels" as between the Plaintiff and the Defendants: *North Central Wagon Company* v. *Manchester, Sheffield, & Lincolnshire Railway Company* (1); nor is it, either in form or substance, "a license to take possession of personal chattels": *Ex parte Parsons* (2). *Mills* v. *Charlesworth* (3) was a different case, for there the document was not a delivery order, but an agreement shewing the whole transaction, and was itself essential to the proof of the pledgee's title to the goods. To sum up our case, we are pledgees having possession of goods under a document sufficient of itself to transfer the possession. The entire transaction was completed on the same day and at the same time, and constituted a delivery of possession of the goods. The transaction is simply of this nature: *A.*, being entitled to goods in the hands of *B.*, asks *C.* for an advance on the security of the goods. *C.* says, "I will lend you the money on the goods upon their being transferred to me." The goods are thereupon transferred to *C.* by delivering possession of them, and the money is advanced. Such a transaction is not within the *Bills of Sale Acts* at all. The delivery order cannot, at all events, be treated as a bill of sale for the payment of *Taylor's* charges.

KEKEWICH, J.:—

The question for decision is whether the charge in favour of the Defendant on the Plaintiff's goods is avoided by the operation of the *Bills of Sale Acts*. The circumstances are peculiar in this sense—that they are more or less distinguishable from those of every reported case; but yet they are such as must frequently have occurred and are likely to recur. There is no occasion to recapitulate them, and I will endeavour at once to apply to them what I understand to be the settled law.

The following propositions are established by the authorities cited, beyond which it is not necessary to travel; and the propositions also and cases overlap.

First, the *Bills of Sale Acts* strike at, not transactions, but

(1) 35 Ch. D. 191. (2) 16 Q. B. D. 532.
(3) 25 Q. B. D. 421.

documents: *North Central Wagon Company* v. *Manchester Sheffield, & Lincolnshire Railway Company* (1).

Secondly, if there be a document at all, it must, unless falling within the stated exceptions, be expressed in the statutory form; and it is no answer to say that the transaction cannot be so expressed: *Ex parte Parsons* (2).

Thirdly, the Acts have no application to a pledge as distinguished from an assurance: *Ex parte Hubbard* (3), where *Ex parte Close* (4) is quoted with approval.

Fourthly, delivery, which is essential to a pledge, may be effected without physical change of possession of the goods: *Mills* v. *Charlesworth* (5).

Fifthly, the Acts have no application to a case where the right to possession can be proved by parol without reference to any document: *Newlove* v. *Shrewsbury* (6).

Sixthly, if the right can be so proved, the co-existence of a document recording the transaction and not expressed in the statutory form does not vitiate it: *Mills* v. *Charlesworth*.

It follows, in my opinion, from these propositions, that there is no document here which comes within the mischief of the *Bills of Sale Acts*. If there is any document at all it is a delivery order. A delivery order does not purport to contain, and would not well contain, the contract between the parties. The contract here was a parol one. The two memoranda which have been referred to relate only to the payment of money, and not to the security of the goods. With regard to the goods, the contract was by parol only. The goods were originally in the possession of the Plaintiff. The delivery order was the means of changing this possession. The owner of the goods had not personally the possession of them. He signed the delivery order as an authority to the actual possessor, *Taylor*, to hand over the goods to his, the owner's, pledgee; and the holding of the goods on behalf of the pledgee under this delivery order was equivalent to possession by the pledgee. When the delivery order had effected that result it had operated for all its purposes. The delivery order is not

(1) 35 Ch. D. 191.
(2) 16 Q. B. D. 532.
(3) 17 Q. B. D. 690.
(4) 14 Q. B. D. 386.
(5) 25 Q. B. D. 421.
(6) 21 Q. B. D. 41.

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essential to the title of the grantee as against the grantor; that title was completed by the parol contract. It is essential for the purpose of requiring the physical possessor to hand over the goods to the grantee. As between the grantee and *Taylor*, it was for the purpose of satisfying *Taylor* that the grantee had contracted with the grantor.

It appears to me that the delivery order falls within that class of cases which has decided, as I have already mentioned, that a record of a transaction—in one of the cases it was a receipt, and in another it was a delivery order—is not within the Acts.

On these grounds I hold that this is not a case within the *Bills of Sale Acts*; and that, notwithstanding that this delivery order was not a document in the statutory form of a bill of sale, and was not registered as a bill of sale, the Plaintiff cannot insist upon the goods being restored to him except upon compliance with the terms of the parol contract which has been proved, and as to which, indeed, there is no question.

Solicitors: *W. Negus; H. Montagu.*

G. I. F. C.

KEKEWICH, J. 1891 *July* 2.

In re AKERMAN. AKERMAN *v.* AKERMAN.

[1891 A. 11.]

Administration—Debt owing to Estate barred by Statute of Limitations—Residuary Real and Personal Estate — Specific Gifts — Debts owing by Beneficiaries, whether to be brought into Account.

A testator devised and bequeathed all his residuary real and personal estate to trustees upon trust to convert, and out of the moneys to arise from the conversion to pay his debts and funeral and testamentary expenses and legacies, and divide the net residue into seven parts, three of which were given to three of his sons absolutely. The testator in his lifetime had advanced sums of money to each of the three sons, but any right of action in respect of such sums, assuming them to be debts owing to the testator, was at the time of his death barred by the *Statute of Limitations*:—

Held, that the principle to be deduced from *Cherry* v. *Boultbee* (1) and

(1) 4 My. & Cr. 442.

Courtenay v. *Williams* (1), is that a person who owes an estate money—that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it; and that, by the application of this principle to the present case, the three sons were bound to bring into account as against their respective shares, as well of the proceeds of sale of the residuary real estate as of the residuary personal estate, any sums due by them to the testator at the date of his death, with interest at 4 per cent. from that date.

By the will freehold and leasehold hereditaments were given specifically to the three sons:

Held, that they were respectively entitled to the properties specifically given without first making good what (if anything) they owed to the testator's estate.

ADJOURNED SUMMONS.

Henry Akerman, by his will, dated the 28th of October, 1886, appointed his wife and his son *James* trustees and executors thereof, and after making certain specific and pecuniary devises and bequests, including a devise of freehold houses to his son *Henry Akerman* the younger, a devise and bequest of a freehold house and three leasehold houses to his son *William Akerman*, and a devise of a freehold house to his son *James Akerman*, devised and bequeathed all his real and personal estate whatsoever, except what he otherwise disposed of by his will or any codicil thereto, unto and to the use of his trustees according to the nature and tenure thereof, upon trust to sell, call in, or otherwise convert into money, such parts of the said trust premises as should not consist of ready money, and out of the moneys to arise from such sale, calling in, conversion, and collection, and the ready money of which he should be possessed at his death, to pay his debts and funeral and testamentary expenses, and the pecuniary legacies bequeathed by his will or any codicil thereto, and to hold the net residue thereof in trust as to three seventh parts thereof, to invest the same for the benefit of his son *Edward* and his (the testator's) two daughters upon certain specified trusts, and to pay the remaining four seventh parts thereof to his sons *Henry*, *William*, *James*, and *George*, in equal shares, as tenants in common.

The testator made codicils to his will, which, however, did not

(1) 3 Hare, 539; 15 L. J. (Ch.) 204.

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alter the effect thereof, as above stated; and died on the 23rd of June, 1890.

The residuary personal estate of the testator consisted mainly of a sum of £2000 due to him on a mortgage which had subsequently to his death been paid off. The residuary real estate consisted of a valuable piece of building land at *Dulwich*.

The testator had in his lifetime from time to time advanced various sums to his sons *Henry*, *William*, and *James*; and at his death there were found in his possession I.O.U.'s for £1080 from *Henry Akerman*, the son, and for £400 from *James Akerman*, and a certificate signed by *William Akerman*, stating that he had borrowed £350 from the testator. These documents respectively bore date more than six years previously to the death of the testator, and also to the date of his will, and it was admitted that if the sums were in fact debts due from the sons to the testator, such debts were barred by the *Statute of Limitations*.

Advances had also been made by the testator to his sons *Edward* and *George*; but, in the case of *Edward*, it was admitted that the debt, if any, had become extinguished by his bankruptcy previously to his father's death; and in the case of *George*, it was not disputed that the amount of the advance must be treated as a subsisting debt.

This was an originating summons taken out by *Henry Akerman* the younger, as Plaintiff, against the trustees and executors of the will and the other persons interested under the will, as Defendants, for the opinion of the Court on various questions arising under the will and codicils in reference to the testator's estate, and, *inter alia*, whether the Plaintiff and the Defendants, or any of them, ought to bring into account, as against their respective shares of the testator's residuary real and personal estate, the sums, if any, due by them respectively to the testator at the time of his death.

There was evidence tending to shew that the testator had released the debts due from his sons *Henry*, *William*, and *James*; but, as will be seen from the judgment, such evidence was not sufficiently explicit to justify the Court in arriving at a conclusion; and accordingly the only question argued was whether, upon the assumption that the sums appearing to be due from

the three sons were to be treated as subsisting debts, such sums ought to be brought into account as above stated.

Warmington, Q.C., and *Butcher*, for the Plaintiff:—

The period fixed by the *Statute of Limitations* having run out, it is clear that the sum of money advanced to the Plaintiff, assuming it to be a debt, cannot now be recovered as part of the residuary personal estate. It may be retained by the executors as against the Plaintiff's share in the residuary personal estate; but it is submitted that there can be no such retainer as against the proceeds of sale of the residuary real estate. No doubt trustees have a lien on the interest of a *cestui que trust* to the extent of the obligation of the *cestui que trust* to them arising out of the subject-matter of the trust. But that right cannot extend to an obligation which is entirely outside the trust premises. Here it was the duty of the legatee to make up the assets, that the executors out of those assets might pay the legacies; and the executors might say to the legatee, "we shall not pay you your share of the residuary personal estate until you first pay the debt which you owe to us as the legal personal representatives." That is the principle of *Courtenay* v. *Williams* (1); but that principle has no application to the proceeds of sale of real estate, with which executors have nothing to do.

[KEKEWICH, J., referred to the report of *Courtenay* v. *Williams*, on appeal (2).]

Dunham, for *James* and *William Akerman*:—

An executor can only retain or set off that which he holds *qua* executor. A trustee cannot retain or set off what a legatee owes not to him but to the executor. As regards the residuary real estate, the executors are merely devisees in trust: *Ballard* v. *Marsden* (3).

[KEKEWICH, J.:—The debt is due to the estate. Does it matter who sues for it?]

The debt is due to the executor. It is a mere figure of speech

(1) 3 Hare, 539, 553. (2) 15 L. J. (Ch.) 204.
(3) 14 Ch. D. 374, 377.

KEKEWICH, J. 1891 In re AKERMAN. AKERMAN v. AKERMAN.

to say that it is due to the estate. In order that the doctrine of retainer or set-off should be applicable, the hand to receive and the hand to pay must be the same: *Cherry* v. *Boultbee* (1); *Courtenay* v. *Williams* (2); *Harvey* v. *Palmer* (3). The right of the executor is to say to the legatee: "pay yourself out of the money which you owe to my testator."

George J. Duncan, for other beneficiaries:—

The principle upon which the doctrine of the so-called retainer or set-off is based is a general one: *In re Cordwell's Estate* (4), and must, it is submitted, be equally applicable whether the estate in which the debtor claims an interest is in the hands of a trustee or an executor. Here there is a mixed fund consisting in part of the proceeds of sale of real estate. If the debtor paid his debt that fund would be increased by the amount of his contribution to it; and the principle of *Cherry* v. *Boultbee* and *Courtenay* v. *Williams* (5), is clear that in such a case the person so bound to contribute can take nothing from the fund unless he first brings in his contribution to it. If the debt had not been statute barred, surely it could have been deducted by the trustees from the proceeds of sale of the residuary real estate; and it is none the less a debt because the remedy for it has been barred by the statute.

Upjohn, for *George Akerman*, adopted the same arguments, and referred to *Priddy* v. *Rose* (6) and (in reference to the release of the debts) to *In re Hancock* (7); *In re Richardson* (8).

Stokes, for the trustees and executors.

Warmington, in reply:—

The debt owing to the testator by the Plaintiff formed a part of the testator's residuary personal estate. The executor, therefore, when the Plaintiff came for his share of that residuary personal estate, might have said to him, according to the principle

(1) 4 My. & Cr. 442, 448.
(2) 3 Hare, 539, 553.
(3) 4 De G. & Sm. 425.
(4) Law Rep. 20 Eq. 644.
(5) 3 Hare, 539; 15 L. J. (Ch.) 204.
(6) 3 Mer. 86.
(7) W. N. (1888) 138.
(8) 30 Ch. D. 396.

of *Courtenay* v. *Williams* (1), "Pay yourself your share out of the money you owe to me." But how could he say this in respect to the proceeds of sale of the residuary real estate? It has hardly been disputed that there cannot be any retainer or set-off as against the property specifically given, and the devise of residuary real estate is as specific as the other devises. If one person had been entitled to the proceeds of sale of the residuary real estate he could have prevented the conversion of it into money, and kept it as real estate; and the fact that he was a debtor to the estate would not have affected his right. It would have been the duty of the executors to sue him for the debt. The argument on the other side, in effect, seeks to raise a case of election as between the devised land and the money owing to the testator, in the absence of any indication of intention appearing on the will.

KEKEWICH, J.:—

The questions which have been argued, and which I am now called upon to decide, directly affect the testator's sons, *Henry*, *William*, and *James*. They also affect *George*, indirectly, because if *Henry*, *William*, and *James*, or any one or more of them have to contribute to the testator's estate by reason of their being debtors to it, *George* would thereby have a larger fund out of which to take his distributive share. The other son, *Edward*, who is also interested under the will, both in respect of property specifically given to him, and in respect of the share of residue of which he is tenant for life, has become bankrupt and obtained his discharge; and it has not been attempted to argue that the debt owing from him, which might otherwise have existed at the time of the testator's death, can now be treated as subsisting, and I therefore leave him entirely out of consideration.

Henry, *William*, and *James*, all take as specific devisees or legatees under the will, and it has been suggested rather than argued, that they cannot take the properties specifically given to them without first making good what they owe (if they owe anything) to the testator's estate. A specific devise or bequest is a thing taken apart, and given directly to the devisee or

(1) 3 Hare, 539.

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legatee. It is extracted from the testator's estate before the residue is ascertained, and under no circumstances, so long as the specific gift takes effect, can the property so given form part of the residue.

On the other hand, a debt due to the estate of a testator is part of the residue. It has to be paid in whole or in part, in whole, if it can be recovered, in order that the residue may be constituted, and there is therefore a clear distinction between a specific legacy and a residuary legacy so far as concerns a debt due from the legatee to the estate. No case has been cited to shew, and it seems to me to be contrary to principle to hold, that there can be a right of retainer in respect of a debt owing from a specific legatee to the estate of the testator.

As regards the residuary personal estate, apart from the argument that there is no debt at all owing to the estate, there has not been any substantial contention that the debtors must not make good their debts before they can take any part of that residue. If the case falls within the ordinary rule that a debtor cannot claim a distributive share of the residue without making good what he owes to that residue, then it is not argued that this case can for any reason be treated otherwise than as that rule indicates. But the difficulty is this. The residuary gift is not confined to residuary personal estate, but comprises real estate also. There is a general residuary gift—a devise and bequest of the real and personal estate of the testator to trustees, who happen in this case to be also executors, upon trust to sell and out of the proceeds of sale, after paying debts and funeral and testamentary expenses and pecuniary legacies, to divide the residue among the testator's children in the shares and manner indicated. In other words it is a strictly proper residue. It is what remains of the testator's property after satisfying the specific gifts, and that strictly proper residue is to be dealt with as the residue should be dealt with, that is, in paying debts and funeral and testamentary expenses and legacies, and then what remains as the ultimate residue, the subject of the testator's bounty, is divided in that character.

The argument is, that though as regards the executors and as regards the personal estate, what is due from the sons must be

brought into account so as to constitute a complete residue, yet as regards the proceeds of sale of the real estate that principle does not apply, and there is this foundation at least for the argument that no case has been produced in which the general rule has been held applicable to such a state of things. The reason why that is so, may perhaps be that which is hinted at rather than mentioned by Vice-Chancellor *Bacon* in the case of *In re Cordwell's Estate* (1), in which he said that he was not surprised at there being no case cited on the point. There an attempt was made to distinguish between the right of an administrator and that of an executor, and the Vice-Chancellor decided the case on the general principle. I think I must decide this case on the general principle. The Lord Chancellor, Lord *Cottenham*, in the case of *Cherry* v. *Boultbee* (2), took occasion to remark that the expression "set-off" is very inaccurately used in cases of this kind, and he might have added, no doubt, that inaccuracy implies confusion. I will venture to add to that remark that the term "retainer" also is inaccurately used in cases of this kind. I have heard more of "retainer" in this case than I have heard of "set-off," but neither the one term nor the other can really be used with propriety, and either, I think, equally introduces confusion.

The principle is to be found laid down in *Cherry* v. *Boultbee* in the passage to which I have just referred, and also in *Courtenay* v. *Williams* (3), and no doubt, if search were made, it would be found to have been laid down in many other cases. It is this. A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back. That is expanding what the Lord Chancellor calls in *Cherry* v. *Boultbee* "a right to pay out of the fund in hand," rather than a set-off, and

(1) Law Rep. 20 Eq. 644. (2) 4 My. & Cr. 442.
(3) 15 L. J. (Ch.) 204.

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is in conformity with what the Lord Chancellor, Lord *Lyndhurst*, in *Courtenay* v. *Williams*, says (1), "The defendant's, the legatee's, demand (the Court says) is in respect of the testator's assets, without which the executor is not liable; and it is very just and equitable for the executor to say, that the defendant, the legatee, has so much of the assets already in his own hands, and consequently is satisfied *pro tanto*." Why should not that be applied to a case like this where the property is put together, and the whole is given to the same persons upon the same trusts, both for payment of debts and other deductions and for division among the same persons? The principle is the same. The contributor to the mass is in precisely the same position whether the mass is held by trustees or by an executor, and it would, to my mind, be introducing mere technicality into the principle, and preventing its proper and reasonable application to say that because there is no legal personal representative of the testator, because the representative is a trustee and not an executor, therefore the contributor is to get off, and have his aliquot share of the mass minus his contribution to it, instead of having his aliquot share of the mass including his contribution.

Mr. *Warmington* says that he takes only real estate, and that he does not claim any personal estate, and therefore the rule in *Courtenay* v. *Williams* does not apply. I am not deciding a case where there is a mere gift of real estate, whether it be a gift directly to the legatee or devisee, or through the intervention of a trustee, or by way of trust for sale. But here I am dealing with a case such as I have mentioned—with a general fund made up of proceeds of sale of real estate, and proceeds of conversion of personal estate, and there seems to me to be a principle of general application, and no reason occurs to me, none has been suggested, why I should not apply that principle. Therefore, I think that if there is a debt payable by a residuary legatee under such circumstances as exist here, that debt must, for the purposes of computation, be included in the residue, and—again for the purposes of computation—treated as part of the share going to the legatee debtor.

Then I am asked to hold that here these three sons do not owe

(1) 15 L. J. (Ch.) 208.

money to the estate. In each case there is an I.O.U. or what is equivalent to an I.O.U., a certificate of indebtedness, and in each case the debt was statute barred at the date of the testator's death. That will not prevent the operation of this rule which is applicable to personal estate, and which I hold to be equally applicable to this mixed fund. But there is some evidence to shew that the testator did not intend to enforce these documents. I have attended to that evidence, and I see the weight of it, and I think it deserves further consideration. I think that seeing that these documents were retained by the testator, and that if it had been intended that there should be a release of the debts, nothing would have been easier than to give them up, it would be unsafe to say without further inquiry whether or not they are enforceable debts. I think on the whole it will be better for me not to comment on the evidence put in on behalf of the beneficiaries. All I hold is, that on the present evidence there are not sufficient materials before me to justify me in arriving at a conclusion. I think the matter must be inquired into, and all I decide at present is that on the evidence before me *William*, *James*, and *Henry Akerman* have not satisfied me that they did not, at the testator's death, owe him the sums mentioned in these respective documents signed by them; and I should further hold that if they do owe those sums, those sums with interest from the testator's death and not before, must be deducted from their aliquot shares. There will be a declaration that the Plaintiff and the two other sons ought to bring into account as against their respective shares of the testator's residuary real and personal estate any sums due by them respectively to the testator at the date of his death with interest at 4 per cent. from that date.

Solicitors: *A. T. Trehearne; J. J. Chapman; Woodard & Hood; T. W. Copeland.*

C. C. M. D.

ROMER, J.
1891
June 6, 15.

BENTLEY *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

[1889 B. 2115.]

Statutory right to commit Damage—Compensation—Failure of Special Statutory Tribunal—Jurisdiction to assess Compensation in an Action.

Where a right is given by statute to do acts causing damage to other persons' property, subject to the payment to such persons of compensation, and the statute provides a special tribunal for assessing the amount of compensation, if such tribunal becomes non-existent, a person whose property has been damaged by the exercise of the statutory right is entitled to have the amount of compensation assessed in the High Court of Justice.

By an Act, 12 Geo. 1, c. 38, the predecessors in title of the Defendants were empowered, as undertakers of the river *D.* navigation, to clear, scour, and deepen the river, and to lay dredgings taken from it on the banks or lands adjacent to the places where the same should be taken out, giving satisfaction to the owners of such lands for any damage thereby occasioned.

The Act appointed a number of persons, therein named, as commissioners for settling, determining and adjusting in manner thereafter mentioned all matters of difference between the undertakers and their successors and the owners of adjacent lands, and provided that such commissioners should have power to determine what satisfaction such landowners should have for the damage done to their lands by the exercise of the statutory powers given to the undertakers.

The Act empowered any fifteen or more commissioners assembled together to elect new commissioners in the places of any commissioners who should be dead or refuse to act.

All the original commissioners were dead, and no commissioners appointed in their places (if any) were in existence:—

Held, that a landowner whose land had been damaged by the exercise by the Defendants of the statutory power to lay on his land things taken from the river, was entitled to have the amount of compensation for such damage assessed in an action.

THE statute 12 Geo. 1, c. 38, after reciting, *inter alia*, that the making and continuing the river *Dun* in the West Riding of the county of *York*, from *Holmstile* in *Doncaster* up to the furthest extent westward of the township or lordship of *Tinsley*, would be very beneficial to trade, and otherwise advantageous as therein particularly mentioned, enacted (sect. 1) that the master, wardens,

searchers, assistants, and commonalty of the *Company of Cutlers* in *Hallamshire*, in the county of *York*, and their successors and assigns, should be undertakers of the said navigation, with full power and authority, by virtue of the Act to make the river navigable and passable, and that for the purposes aforesaid they should have full power and authority (*inter alia*) to clear, scour, open, enlarge, straighten or deepen the river, and to cut, remove, and take away all trees, roots of trees, beds of gravel, sand, or mud, quarries of stone, or any other impediment whatsoever, which might anyways hinder navigation upon the river, "and also to lay all earth, gravel, sand, roots, rubbish, and other things dug or taken out of the said river . . . . in order to the making or preserving of the said navigation, upon the banks of the said river, or lands adjacent, or near the places where the same shall be dug or taken out . . . and from time to time, and at all times hereafter to do all other matters and things necessary or convenient for making, maintaining, continuing, and perfecting the navigable passages of the said river *Dun* . . . the said undertakers, their successors or assigns, doing as little damage as may be, and first giving satisfaction to the respective owners and proprietors of such . . . lands, tenements, or hereditaments as shall be . . . made use of for every or any the purposes aforesaid, or that in anywise shall be prejudiced or damaged by or for carrying on, effecting, preserving, continuing, or maintaining the said navigation, and also giving satisfaction for all damages that shall be done to the ground near to the said place or places where the said works or any of them is, are, or shall be made, erected, or done by reason of carrying, laying, or working any materials, earth, sand, gravel, roots, rubbish, or other things thereon, according to the true intent and meaning of this Act, as is hereinafter directed and appointed."

Sect. 2 enacted that "for the better effecting the premises, and due rating the matters and things for which satisfaction shall be given, in case the said undertakers, their successors and assigns, cannot beforehand agree with the respective owner and owners of such . . . hereditaments concerning the same," certain noblemen and gentlemen therein named, "or any seven or more of them together assembled, in such manner as is hereinafter

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expressed, shall be and are hereby constituted and appointed commissioners for settling, determining, and adjusting, in manner hereafter mentioned, all matters about which any difference shall or may arise between the said undertakers, their successors and assigns or any of them, and the proprietors, owners, and occupiers of any such . . . lands, tenements, or other hereditaments; and they the said commissioners, or any seven or more of them assembled together, are hereby authorized and empowered and shall have full power and authority to mediate all differences between the said undertakers, their successors and assigns, and the respective owners and occupiers of such lands . . . tenements, or other hereditaments which shall be intended to be . . . . damaged or made use of as aforesaid, for the carrying on or effecting the said undertaking, or which shall or may in any wise be prejudiced or damaged thereby, or by reason thereof, and by writing under their hands and seals to adjust, settle, and determine, with the consent of the parties concerned, what satisfaction every such person or persons, bodies politic or corporate respectively, shall have for such proportion of his, her, or their lands, tenements . . . or other hereditaments as shall be . . . . made use of, or prejudiced or damaged as aforesaid, and for the damage that shall be thereby sustained." The section also provided: "And if it shall happen that the said undertakers, their successors or assigns, for and on the part and behalf of themselves, or that any other person or persons, bodies politic or corporate, for and on his, her, and their own parts, shall dislike or be dissatisfied with any such determination of the said commissioners, or any seven or more of them, or shall decline such determination, or that any person or persons, bodies politic or corporate," after notice, should for twenty days "neglect or refuse to treat, deal and agree with the said undertakers, their successors or assigns," or through disability "cannot treat for themselves or make such agreement as shall be convenient for the promoting such navigation as aforesaid, or by reason of absence shall be prevented from treating touching the matters aforesaid," then and in every such case the commissioners or any seven or more of them should and were thereby empowered to issue a warrant to the sheriff, or in case he should be interested in the thing in

question, to one of the coroners, to summon a jury to appear before the commissioners or any seven or more of them to hear and try the facts before them; and also to summon witnesses, which jury should "assess such damages and recompense as they shall think just to and for the respective owners, tenants, or occupiers of any . . . lands, tenements or other hereditaments or any part thereof, which shall be used . . . prejudiced, damnified, or demolished by or for making any such lock . . . or doing any other act or thing for making the said river navigable, or for continuing or improving the navigation thereof . . . . or in respect of such loss and damage as any such owners, tenants, or occupiers, shall or may thereby sustain."

The section further provided that the commissioners, or any seven or more of them assembled together, should give judgment for the sums assessed by the jury, and "shall in such manner, as aforesaid, and by all other lawful ways and means, examine, hear, and finally determine all manner of differences, controversies, and disputes, which shall arise between any persons whatsoever touching or concerning any matter or thing relating to the aforesaid premises or any part thereof, which said verdict or verdicts, and the judgment, decree or determination thereupon declared and pronounced by the said commissioners, or any seven or more of them assembled together, and the value and recompense to be assessed and declared"—after notice given as specified in the Act—"shall be binding and conclusive to all intents and purposes against the King's Majesty, his heirs and successors, and against all and every person and bodies politic and corporate whatsoever, their heirs, successors, executors, administrators, and assigns, having or claiming any title or interest in or to the said lands, tenements, or premises, or any part thereof, or any interest or title into or out of the same in possession or reversion, remainder, expectancy, or otherwise, as well infants, feme coverts, tenants for life or years, or in tail, or other their respective heirs, successors, executors, administrators, and all claiming by, from or under, or in trust for him, her, or them, or any of them."

Another section of the same Act provided as follows: "And in case any of the said commissioners shall die, or refuse to act,

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then, and in such case, so often as it shall so happen, any seven or more of the said commissioners assembled together may appoint a meeting of commissioners at *Sheffield* or *Rotherham*, for the election of one or more new commissioner or commissioners, as the case shall require, to supply their places . . . . and in case there shall be fifteen or more of the said commissioners assembled together at the time and place so appointed for such meeting, they shall and may proceed to elect one or more new commissioner or commissioners, in lieu of such of the said commissioners as shall be dead, or refuse to act," and that the person or persons so chosen should be recorded by the clerk of the commissioners, and should thenceforth, if qualified, "be and act as a commissioner or commissioners to all the purposes aforesaid, and shall have the same power and authority in all things relating to the matters aforesaid, as if they had been expressly named and appointed by this Act."

It was admitted in the present action that all the commissioners named in the Act 12 Geo. 1, c. 38, were dead, and that no new commissioners (if any) appointed in their places were in existence.

By the Act 13 Geo. 1, c. 20, the mayor, aldermen, and burgesses of the Borough of *Doncaster*, their successors and assigns, were appointed undertakers of the navigation of the river *Dun* from *Holmstile* to *Wilsick House*, in the parish of *Barmby-super-Dun*, with powers as to executing works, and restrictions as to compensation similar to those in the Act, 12 Geo. 1, c. 38.

By the Act 6 Geo. 2, c. 9, the undertaking of the navigation of the river, both from *Holmstile* to the utmost extent of *Tinsley* westward, and from *Holmstile* to *Wilsick House*, and all powers, privileges, advantages, property and things (with an immaterial exception) were divided into 150 shares and vested in certain corporations and persons, and the several proprietors of the shares and their successors and assigns were thereby incorporated by the name of "*The Company of Proprietors of the Navigation of the River Dun*," with power to do such acts in order to the making of the river navigable and to maintain and support the navigation thereof, both above and below *Holmstile*, as the two

former corporations might have done or were empowered to do under the two previous Acts above stated.

In 1823, 1835, and 1840, certain pieces of land on the banks of the river *Dun* were conveyed to the *Company of Proprietors of the River Dun* in fee.

By the statutes 10 & 11 Vict. c. ccxci. s. 60, and 13 & 14 Vict. c. lvii. s. 26, the river *Dun* navigation, and all cuts, roads, and towing-paths to the same belonging, and the ground and soil thereof respectively, and all other the lands and hereditaments, easements and appurtenances whatsoever, of or to which the said navigation company was seised, possessed, or entitled by virtue of their Acts or otherwise, and all the powers, authorities, rights, and privileges with reference to the river *Dun* navigation which might have been exercised by the said navigation company, became vested in the *South Yorkshire Railway and River Dun Company.*

By an indenture dated the 23rd of January, 1863, the *South Yorkshire Railway and River Dun Company* granted and conveyed the greater part of the pieces of land conveyed to them as above mentioned to *R. J. Bentley* in fee, "saving and reserving unto the said *South Yorkshire Railway and River Dun Company*, their successors and assigns, for ever hereafter, over and along the several strips of land hereinbefore first and secondly described, a full and free right of towing-path, for all purposes, by themselves and others, of towing or drawing boats along the banks of the river *Dun*, with all such rights and privileges as are specified in the several Acts of Parliament relating to the said river *Dun* navigation or the towing-paths thereof, and with all the rights and privileges incident and necessary to the use and repair of such navigation and towing-paths respectively."

Part of the land so conveyed was bounded on one side by the river *Dun*, and was within the limits of the Act 12 Geo. 1, c. 38.

By the Act 27 & 28 Vict. c. lxxvii., the undertaking of the *South Yorkshire Railway and River Dun Company*, including the navigations and hereditaments acquired by such company, became vested in the Defendants, the *Manchester, Sheffield, and Lincolnshire Railway Company.*

The present action was commenced by *R. J. Bentley*, who

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alleged that in 1889 the Defendants had deposited quantities of earth and other materials on his said land, and thereby caused considerable damage, without previously having tendered satisfaction for such damage, and that the Defendants had also refused to make any satisfaction for the same, and he claimed an injunction and damages.

R. J. Bentley having died, the action was revived by his executors, who were also the devisees in trust of his real estate, and by their pleadings, as amended, they claimed—

"(1.) An injunction restraining the Defendants from laying or depositing upon the Plaintiffs' land, or any part thereof, any earth, gravel, sand, roots, rubbish, or other things, except so far as they are authorized to do so by the said Act of the 12th year of King *George* the First or any subsequent Act relating to the navigation of the river *Dun*; and from laying or depositing upon the Plaintiffs' land, or any part thereof, any earth, gravel, sand, roots, rubbish, or other things, under the authority conferred by any such Act or Acts, without having first given to the Plaintiffs due satisfaction for all damage that shall be thereby done.

"(1A.) Alternatively, a declaration that the Defendants are not entitled to lay or deposit upon the Plaintiffs' land, or any part thereof, any earth, gravel, sand, roots, rubbish, or other things, without giving to the Plaintiffs due satisfaction for all damage that shall be thereby done.

"(2.) Damages for wrongfully entering on the Plaintiffs' land subsequently to the month of February, 1889, and depositing earth, gravel, sand, roots, rubbish, and other things thereon."

The action came on for trial with witnesses, but no witnesses were called, it being arranged that certain questions of law should be argued, and that, if the Defendants were held to be liable in an action to pay compensation, the amount of such compensation should be ascertained on an inquiry to be directed by the Court.

Healey, Q.C., and *Hatfield Green*, for the Plaintiffs:—

The Act 12 Geo. 1, c. 38, gave the *Cutlers' Company* a statutory right to commit what would otherwise have been trespasses on the lands of other people on the banks of the river, but subject

to their paying compensation for the damage done. That compensation is directed to be assessed by certain commissioners named in the Act; but they are admitted to be now all dead, and it is also admitted that no commissioners appointed in their place, if even any were appointed, are now in existence. The Defendants will contend that the statutory power of doing damage has become vested in them under various statutes; but if that is so, they are subject to the original statutory restrictions as to paying compensation for the damage done in the exercise of their statutory powers. It has become impossible to have the amount of the compensation assessed by the tribunal created by the statute 12 Geo. 1, c. 38, and the principal question is, whether, that tribunal having ceased to exist, the Plaintiffs are entitled to have the amount of compensation assessed in an action in this Court. The statute 12 Geo. 1, c. 38, meant that the undertakers should not exercise their rights without paying for the damage done to other people; and, says *Holt*, C.J.: "Wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity": *Anonymous* (1). Where a statute imposed rates on ships passing a certain port, and empowered the collectors of the rates to distrain ships and tackle for non-payment of the duty, and provided that if an owner avoided payment, the duties should be recovered by the same method as that applying to fines and penalties (viz., action or distress), it was held that an action would lie on the statute to recover the duties, and that the remedy by distress was merely cumulative: *Shepherd* v. *Hills* (2). *Parke*, B., in that case says: "There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary" (3).

[ROMER, J.:—Suppose there were now commissioners in existence, could the Plaintiffs obtain an inquiry in an action?]

(1) 6 Mod. 26.

(2) 11 Ex. 55.

(3) 11 Ex. 67.

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Yes. The statute does not give the landowner any new right because he is primarily entitled to recover damages for what in the absence of the statute would be a trespass. Unless the statute says he is to be deprived of that remedy, he is still entitled to it. The statutory right to go to the commissioner was merely cumulative; it was only a more convenient method of having the damages assessed. There was nothing to take away the common law right to come to the ordinary Courts. It is only when the statute creates a new duty or a new obligation, and gives a remedy for a breach of it by a peculiar proceeding, that an action is prohibited: *Vestry of St. Pancras* v. *Batterbury* (1). *Willes*, J., there distinguished *Shepherd* v. *Hills* (2), alleging the ground of that decision to be that the distress was not a perfect remedy (3). Although a statute provided a special remedy for enforcing payment of fees in county courts, it was held that an action for debt at common law might nevertheless be maintained: *Batt* v. *Price* (4). There was, when the statute 12 Geo. 1, c. 38, passed, a common law right to proceed for trespass, and that right was not ousted by the appointment of the commissioners. A specific statutory remedy for enforcing rules regulating mines in the *Forest of Dean* was held not to exclude a right of action for injuries caused by a breach of the rules: *Ross* v. *Rugge-Price* (5). Even if a new right or duty is created, and also a special tribunal, if such tribunal is not available, the proper remedy is by action; for instance, when the special tribunal of arbitration pointed out in a partnership deed cannot be utilized, the Court assumes jurisdiction: *Dinham* v. *Bradford* (6).

The Plaintiffs also submit that, on the construction of the Act 12 Geo. 1, c. 38, the payment of compensation by the undertakers is a condition precedent to the right of exercising the statutory powers.

Neville, Q.C., and *C. A. Russell*, for the Defendants:—

1. Whatever has been done by the Defendants is not a trespass

(1) 2 C. B. (N.S.) 477.
(2) 11 Ex. 55.
(3) 2 C. B. (N.S.) 483.
(4) 1 Q. B. D. 264.
(5) 1 Ex. D. 269.
(6) Law Rep. 5 Ch. 519.

or a wrong of any kind, but something which by statute they are authorized to do. There being no injury, there can be no right of action. It is true that compensation is to be paid, but only such compensation as is assessed by the commissioners. The only remedy is that given by the statute.

2. The payment of compensation is not a condition precedent to the exercise of the statutory powers: *Lister* v. *Lobley* (1).

3. The Plaintiffs take under a conveyance from the Defendants' predecessors in title, which reserves to the latter, and to the Defendants as their successors, the rights and privileges specified in the Acts of Parliament; and the effect is to reserve such rights and privileges without compensation or payment being required.

ROMER, J.:—

It is common ground here, that if compensation is payable by the Defendants for exercising the right of entering upon the Plaintiffs' land and depositing thereon spoil or refuse from the dredging of the river, the compensation cannot be assessed in the manner provided by the statute 12 Geo. 1, c. 38, because the commissioners named in such statute no longer exist, nor are there now living any persons who were appointed in their place, if any such persons were appointed.

The first question I have to decide is, whether the Defendants have the right to deposit rubbish upon the Plaintiffs' land without paying compensation. Now the Defendants have, under the Acts of Parliament which have been referred to, the right, for the purposes of preserving, using, and repairing the navigation, or in relation to it, to deposit rubbish, raised from the bed of the river, upon the adjoining lands, but upon paying compensation. In my opinion, those statutory rights, and no others, are reserved to them by the words, to which attention was called, in the conveyance to the Plaintiffs' predecessors in title of the 23rd of January, 1863. Now, what are the rights, and liberties, and privileges which the Defendants have under those Acts? The Defendants have not the right to deposit rubbish without paying compensation, but the right to deposit

(1) 7 Ad. & E. 124.

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subject to paying compensation, and no greater rights. The Plaintiffs' position is this: They are entitled to say to the Defendants, "You can exercise the rights, and only the rights, given you by the Acts of Parliament, and your right is, *inter alia*, the depositing of rubbish on our land, subject to the payment of compensation"; and, in my judgment, the Defendants have not the right to use the land of the Plaintiffs by depositing rubbish thereon without paying compensation.

The next question is, Can I assess the compensation in an action, or is the contention of the Defendants right, that, inasmuch as a method of assessing the compensation is pointed out by the Act 12 Geo. 1, c. 38, and that method can no longer be utilized, the Plaintiffs are wholly without remedy? The Act clearly points out that satisfaction is to be given for the damage done, and it does not follow that, because a special remedy is pointed out, and that remedy can no longer be had recourse to, the Defendants are relieved from their obligation to give satisfaction for the damage they have done. That obligation remains. Compensation must be paid in some shape or form; and, seeing that it cannot be assessed, or the right to it enforced, by the special remedy given by the Act, in my judgment it must be enforced by action, and I so decide.

It has been agreed between the parties that I am not at this trial to assess the amount of compensation which is to be paid by the Defendants, but that an inquiry as to the amount shall be directed.

A further question argued before me, to a certain extent, was this: whether it was a condition precedent to the Defendants' right to utilize the Plaintiffs' land for the purposes of the navigation, by depositing the spoil on it, that the Defendants should pay compensation—in other words, whether the Defendants were bound to pay compensation to the Plaintiffs before entering on their land. It is not absolutely necessary for me to decide that question, because the Plaintiffs said that it was a matter of indifference to them, so long as they got compensation, whether payment of such compensation was a condition precedent or not; but, as the Defendants' counsel have expressed a desire to have my decision on this point, because by the amended state-

ment of claim an injunction is claimed on the ground that payment of compensation is a condition precedent, I can only say that it is not established to my satisfaction that such payment is a condition precedent, and, therefore, I do not grant the injunction.

The statement of claim ought to be amended in one small particular. It asks for damages for "wrongfully entering." The word "wrongfully" must be omitted, and there must be an inquiry as to the damage caused by the Defendants entering on the Plaintiffs' land to deposit rubbish. I make a declaration that the Defendants are not entitled to lay or deposit upon the Plaintiffs' land, or any part thereof, any earth, gravel, sand, roots, rubbish, or other things, without giving to the Plaintiffs due satisfaction for all damage that shall be thereby done. There will be an inquiry as to damages in the form I have indicated, with liberty to apply when the damages have been assessed; and the Defendants must pay the costs of the action.

Solicitors for Plaintiffs: *Belfrage & Co.*, agents for *W. Smith & Sons, Sheffield.*

Solicitors for Defendants: *Cunliffes & Davenport*, agents for *R. Lingard-Monk, Manchester.*

F. E.

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[1890 S. 2707.]

Trustee—Breach of Trust—Residuary Personalty held on Trust—Executor—Legacy—Statute of Limitations—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8 [*Revised Ed. Statutes, vol. xvii., p.* 253].

A farmer, who died in 1872, by his will gave his residuary personalty to *G.*, *W.*, and *T.*, upon trust, as soon as convenient after his decease, for conversion, and, after payment of his debts and funeral and testamentary expenses, to stand possessed thereof upon the trusts thereinafter declared as to the proceeds of sale of his realty.

The realty was devised to *G.*, *W.*, and *T.*, upon trust for sale, when *X.*, the testator's youngest son, should attain twenty-one, and to hold the proceeds of sale and of conversion of the residuary personalty, after payment

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of certain expenses and incumbrances, upon trust to invest the proceeds of the residuary personalty, and pay the income, with the rents of the realty until sale, to *P.*, the testator's widow, during widowhood (she maintaining and educating his family), and after her decease or second marriage, upon the trusts thereinafter declared. The trustees, as soon as *X.* attained twenty-one, were to invest £1400; pay the income to *P.*, during widowhood; on her death, or second marriage, divide the £1400 among testator's four daughters; and stand possessed of the residue of the proceeds of sale of the realty and personalty, in trust, as soon as convenient after *X.* should have attained twenty-one, to pay the same to *X.* and his three elder brothers in the will named. *G.*, *W.*, and *T.*, were also appointed executors of, and proved the will.

Instead of realizing the residuary personalty, *G.*, *W.*, and *T.*, in breach of trust, allowed *P.* and the children to reside at the farm carried on by the testator, and themselves carried on the farm, and maintained *P.* and the children, and educated the children, out of the profits of the farm, till 1882, when *X.* attained twenty-one, and the residuary personalty and the realty were sold.

In 1890, *P.* and the children being all alive, and *P.* being still a widow, two of the sons commenced an action against *T.* (the surviving executor and trustee), for a declaration that he, as surviving trustee, was liable to make good an alleged loss of £1800, said to have resulted from the breaches of trust, and for payment into Court of the Plaintiffs' share of this sum, or, in the alternative, for a declaration that *T.*, as surviving trustee, was liable to make good to the testator's estate the loss caused by such delay in realizing and by carrying on the farm, and an inquiry as to the amount of the loss:—

Held, that the action was not one for a legacy to which the lapse of twelve years could be pleaded under 37 & 38 Vict. c. 57, s. 8; but an action for a breach of trust, to which "no existing Statute of Limitations" applied before the *Trustee Act*, 1888, was passed, and that, under s. 8 of that Act, the lapse of six years was a good plea as a bar to the action.

WILLIAM SWAIN, of *Benington*, in the county of *Lincoln*, farmer, by his will, dated the 27th of March, 1869, after giving certain specific legacies, bequeathed unto *George Hoyles*, *William Hoyles*, and *Thomas Bringeman*, all his live and dead stock, implements of husbandry, moneys, and securities for money, book-debts, and all other his personal estate and effects of every kind not thereinbefore specifically bequeathed, upon trust that they, and the survivor or survivors of them, should, as soon as convenient after the testator's decease, convert the same, and stand possessed thereof, after payment of his debts and funeral and testamentary expenses, upon the trusts thereinafter declared

concerning the moneys to arise from the sale of his real estates. And the testator thereby devised his real estate to the said *George Hoyles*, *William Hoyles*, and *Thomas Bringeman*, and their heirs, upon trust that they, and the survivors or survivor of them, his heirs and assigns, should, as and when the testator's youngest son, *Walter Morton Swain*, should attain his age of twenty-one years, sell and dispose of his real estate, and stand possessed of the moneys to arise from the sale and conversion of his said real and residuary personal estates, and of all other moneys which should come to their and his hands, upon trust, after payment of the expenses of sale and all mortgages and incumbrances affecting his real estate, and the debt of £200 due as therein mentioned, to invest the moneys to arise from his residuary personal estate, and stand possessed of the interest and annual income, as the same should become due, upon trust to pay the same, together with the rents of his real estate until sale, unto the testator's wife, *Phœbe Swain*, for her life or until her second marriage, she maintaining and educating the testator's family, and, after her decease or second marriage, then upon trust to stand possessed thereof upon the trusts thereinafter mentioned. And the testator thereby directed that, when and so soon as his youngest son, *Walter Morton Swain*, should have attained his age of twenty-one years, his trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should invest the sum of £1400, and stand possessed of the annual income thereof, as the same should become due, upon trust to pay the same to his wife *Phœbe Swain*, for her life or until her second marriage; and, after her decease or second marriage, upon trust to pay the said sum of £1400 unto and equally amongst the testator's four daughters, therein named; and upon trust that his said trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should stand possessed of the residue of the moneys arising from the sale of his said real and personal estate, in trust to pay the same, as soon as convenient after his said son, *Walter Morton Swain*, should have attained his age of twenty-one years, unto and equally between and amongst the testator's four sons, *William Swain*, *John Swain*, *Thomas Morton Swain*,

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and *Walter Morton Swain*, share and share alike, to whom he thereby gave and bequeathed the same accordingly. And the testator thereby provided that the trustees, with the consent of his said wife, if living and the testator's widow, and if not, then at their or his discretion, might apply for the advancement of any of the children or their issue, or on the marriage of such children, or issue being a daughter (*sic*), the whole or part of the portion to which such child, children, or issue might be presumptively entitled; and also, after the death or second marriage of the testator's wife, might apply, for maintenance and education, the income of the portion to which such child, children, or issue might be presumptively or absolutely entitled. And the testator thereby directed that, in the event of the death of any one or more of his said children, leaving issue, such issue should be entitled to the share which the deceased parent or parents of such issue would have taken if living. And the testator thereby appointed *George Hoyles*, *William Hoyles*, and *Thomas Bringeman*, executors of his said will.

The testator died on the 5th of February, 1872, and his will was proved by the three executors on the 13th of April, 1872.

The testator's wife, four daughters, and four sons, including *Thomas Morton Swain* and *Walter Morton Swain*, survived him, and they were all living when the present action was commenced, the wife not having been again married.

George Hoyles died in 1881, and *William Hoyles* died in 1887.

Instead of realizing the testator's residuary personal estate, the trustees, at the instance of his widow, in breach of trust allowed her and the children to live at the farm which the testator had occupied, and the trustees, and the survivors of them, carried on the farm, by the profits of which the widow and children were maintained and the children were educated.

This state of things continued till the 21st of March, 1882, when *Walter Morton Swain* attained the age of twenty-one years; and about this time the farming operations were discontinued, and the stock and produce upon or employed in the cultivation of the land were sold.

The real estate (except a reversionary interest under the will of *R. Needham*) was realized in August, 1882, and, after payment

of the debts, *Thomas Bringeman*, the surviving trustee, had a balance in hand in respect of which he had delivered accounts.

In July, 1890, *Thomas Morton Swain* and *Walter Morton Swain* commenced the present action against *Thomas Bringeman*, claiming a declaration (1.) that the Defendant, as surviving trustee, was liable to make good to the testator's estate an alleged loss of £1822 3*s.* 3*d.*, said to have been caused by the delay in realising his residuary personal estate, and by employing his assets in the farming business; (2.) payment into Court of one-half of the sum of £1822 3*s.* 3*d.* (alleged to represent the share of the Plaintiffs therein); or, in the alternative (3.), a declaration that the Defendant, as such surviving trustee, was liable to make good to the testator's estate the loss which had accrued thereto by reason of his alleged default in not selling and disposing of the live and dead stock and implements of husbandry of the testator as soon as convenient after his decease, and by reason of the investment of any portion of the estate in carrying on the farming business; (4.) an inquiry as to the loss occasioned by the breaches of trust; (5.) an order that the Defendant should make good to the Plaintiffs their shares or proportions of such loss when ascertained; and (6–8.) incidental relief.

The Defendant, by his statement of defence, stated that all the alleged breaches of trust had taken place more than six years before the commencement of the action, and that *Walter Morton Swain* had waited about eight-and-a-half years after attaining twenty-one, and *Thomas Morton Swain* about eleven years after attaining twenty-one, before commencing proceedings; and submitted that the claim in the action was barred by laches and acquiescence, and by the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), s. 8 (1), the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), s. 8, and 21 Jac. 1, c. 16.

(1) 51 & 52 Vict. c. 59, s. 8: "(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like

ROMER, J.

1891

In re SWAIN.

SWAIN *v.* BRINGEMAN.

Healey, Q.C., and *A. Birrell*, for the Plaintiffs:—

The Plaintiffs are suing an executor to recover from him a legacy. In 1888, when the *Trustee Act*, 1888, was passed, the *Statute of Limitations* applicable to such an action was the *Real Property Limitation Act*, 1874, 37 & 38 Vict. c. 57, sect. 8 of which substitutes a period of twelve years for the period of twenty years which was necessary under 3 & 4 Will. 4, c. 27, s. 40. The Defendant's counsel will rely on sect. 8. sub-sect. 1 (*b*) of the *Trustee Act*, 1888, and contend that this is an action against a trustee, to recover money, to which "no existing statute of limitations" applied in the year 1888; but the action, being one to which the lapse of twelve years might then have been pleaded, is not within the clause. If the contention of the Defendant's counsel is correct, the result is curious, for an executor may be sued within twelve years, but where a trustee is interposed for the legatee's protection, such trustee may plead the statute 21 Jac. 1, c. 16, after the lapse of six years. It was long since settled that a share of residue was a legacy within sect. 40 of 3 & 4 Will. 4, c. 27. The expression "trustee," in sect. 8, sub-sect. 1 (*b*) of the *Trustee Act*, 1888, has a wider meaning than that which the Defendant seeks to put on it. Sect. 1, sub-sect. 3, says that "trustee" is to be "deemed to include an executor or administrator." Sect. 8, sub-sect. 1 (*b*) must therefore be read, as if it expressly enabled the defence of a lapse of six years to be pleaded only in those cases where no

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extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him;

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received . . . .

(3) This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

existing statute of limitations existed, prior to 1888, in favour of a trustee, executor, or administrator.

[They were stopped.]

Farwell, Q.C., and *Swinfen Eady*, for the Defendant:—

If the contention of the Plaintiffs' counsel is correct, it is strange that no statute of limitations was ever successfully pleaded to such a claim as this before the *Trustee Act*, 1888, came into operation. The only proceeding possible here was against the Defendant as a trustee. The executors could not have been sued, because they had assented to the legacy. On giving such an assent executors, *quâ* executors, are discharged, even where the will appoints the same persons as executors and trustees.

Before 1888 there was, undoubtedly, an existing statute of limitations in favour of an executor, sued as such for a legacy, and the object of the Legislature in passing the *Trustee Act*, 1888, was to protect trustees. If the Plaintiffs' counsel is right, the result of that Act is, that one period of limitation applies to a trustee by will, and another period to a trustee by deed.

Executors are not liable, as executors, for a residuary legacy payable *in futuro*, for in such a case they hold the legacy as trustees. Here the period of distribution did not arrive till ten years after the testator's death, and in the meantime the property was held in trust. There are clearly trusts expressed in the will, as to both the realty and the personalty. In fact, the testator created a blended fund of realty and personalty, in respect of which he declared trusts in favour, first of his widow, and then of his children; and it is for breaches of trust that the Plaintiffs' sue. Subject to the period of limitation being reduced from twenty years to twelve years, the law as to pleading the statute to a proceeding to recover a legacy is exactly what it was under 3 & 4 Will. 4, c. 27, s. 40. A suit against an executor for an account of money bequeathed on certain trusts, which the executor had severed from the general personal estate, and the interest of which had been applied under the trusts, was not within that section: *Phillipo* v. *Munnings* (1),

(1) 2 My. & Cr. 309.

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and the section did not apply to an express trust for the payment of legacies out of the rents and profits of land: *Watson* v. *Saul* (1). In that class of proceedings to which the present action belongs the claim is against a trustee for a breach of trust, and no statute of limitations could, before 1888, be pleaded as a bar to such proceedings. There being "no existing statute of limitations" which in 1888 applied to such actions, the Defendant is, under sect. 8, sub-sect. 1 (*b*) of the *Trustee Act*, 1888, entitled to plead the lapse of time which has occurred as a bar, "in the like manner and to the like extent" as in an action of debt for money had and received—that is to say, under 21 Jac. 1, c. 16, the lapse of six years may be pleaded as a bar to the action. Lord Justice *Fry* has held, under sect. 8 of the *Trustee Act*, 1888, that a lapse of six years may be pleaded as a bar to an action for a legacy bequeathed in trust: *In re Bowden* (2).

Healey, in reply:—

In *In re Bowden* there was a clear breach of trust. In *Phillipo* v. *Munnings* (3) there was in effect a settled legacy. Here there was a clear right of action for a definite sum on the 21st of March, 1882, when the trust, if any, was at an end, and that would only be barred by the lapse of twelve years. At any rate, the Plaintiffs are entitled to succeed as to the personalty; because, by a testator merely imposing on his executors the task of paying his debts and legacies, which it is their regular duty to do, he does not, as to the personalty, create any trust: *Cadbury* v. *Smith* (4).

[*Farwell*:—The ground for that decision was that no trust at all was created (5).]

He also referred to *In re Johnson* (6).

ROMER, J.:—

The short point which I have to decide in the case before me is, really, whether this is an action for a legacy, or for relief in

(1) 1 Giff. 188.
(2) 45 Ch. D. 444.
(3) 2 My. & Cr. 309.
(4) Law Rep. 9 Eq. 37.
(5) Ibid. 43.
(6) 29 Ch. D. 964.

respect of a breach of trust. In my judgment, it is for the latter.

It is an action brought against a trustee for committing a breach of trust, and it is one to which, prior to the year 1888, "no existing statute of limitations" applied. That being so, it appears to me that sect. 8, sub-sect. 1 (*b*), of the *Trustee Act*, 1888, applies, and therefore the period of time, after the expiration of which the action is barred, is six years from the time when the loss occasioned by the breach of trust occurred.

On the 21st of March, 1882, the Plaintiff, *Walter Morton Swain*, the youngest son of the testator, attained the age of twenty-one years, and at that time the loss had already occurred by the breach of trust. That being so, this is an action against a trustee, founded on a breach of trust, to recover money. No existing statute of limitations applied to such an action at the time when the *Trustee Act*, 1888, was passed, and therefore by sect. 8, sub-sect. 1 (*b*), of that Act, the lapse of time—six years—which, if set up, would have been a bar to an action of debt, may be pleaded "in the like manner and to the like extent" in the present action.

That disposes of the whole action, which must be dismissed, but without costs.

Solicitors: *H. M. Dalston*, agent for *Turner & Barrows, Nottingham; Jenkins, Baker, & Co.*, agents for *F. T. White & Son, Boston.*

F. E.

C. A.
1891
May 27;
June 5, 9, 17

In re BENCE.
SMITH *v.* BENCE.

[1890 B. 5275.]

Will—Remoteness—Gift over on a Compound Event—Splitting Gift over.

A testator gave one-fifth share of his residuary estate upon trust for his son *A.* for life, and after his death upon trust for such child or children of *A.* as being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, and also such child or children of any son or daughter of *A.* who might die under the age of twenty-one years as should live to attain twenty-one, or, being a daughter, to be married, in equal shares and proportions *per stirpes*. The four other fifth shares were given by reference on similar trusts for the testator's daughters *B. C. D.* and *E.* respectively, and their respective issue. And the testator declared that if any or either of *A. B. C. D.* and *E.* should die without leaving any lawful issue who should live to attain a vested interest in their respective shares of the estate, the share or shares to which such failure should happen should go over on the trusts therein mentioned. *B.* died without ever having had a child:—

Held (affirming the decision of *Kekewich*, J.), that the gift over in the event of *B.*'s dying without leaving lawful issue who should live to attain a vested interest could not be split so as to make the gift over take effect in the event which had happened of her dying without ever having had a child.

Evers v. *Challis* (1) considered; *Watson* v. *Young* (2) observed upon.

WILLIAM BENCE, by will dated the 11th of October, 1855, gave his real and personal estate to trustees upon certain trusts during the life of his wife, and after her death he directed his trustees to stand seized and possessed of his trust estates and premises, as to one-fifth part thereof in trust to pay the income to testator's son *William Henry Bence* for life, and after his decease, or in case he should attempt to alienate, dispose of, or receive his life interest by way of anticipation, or, become bankrupt, or, take the benefit of any Act for the relief of insolvent debtors, whereby his estate or interest would vest in any other person "upon trust to convey, assign, and pay the said one-fifth part of the said trust estates and premises, unto or among such child or children of my son *W. H. Bence* as shall live to attain the age of twenty-one years, or being a daughter or daughters

(1) 7 H. L. C. 531. (2) 28 Ch. D. 436.

shall live to attain that age or be married, and also such child or children of any son or daughter of the said *W. H. Bence* who may die under the age of twenty-one years, as shall live to attain the age of twenty-one years, or, being a daughter, to be married, in equal shares and proportions *per stirpes* and not *per capita*. And in default or failure of issue of the said *W. H. Bence*, then the said one-fifth shall be in trust for all my other children or their issue in equal shares and proportions as tenants in common *per stirpes* and not *per capita*." As to another fifth share the testator directed his trustees to convey it to his younger son absolutely. As to another fifth share, the testator directed the trustees to pay the income to his daughter Mrs. *Bastin* for life for her separate use with a restraint on anticipation. "And from and after the decease of my said daughter the same fifth part of the said trust estates and premises shall be in trust for her children or more remote issue in like manner as is hereinbefore declared with respect to the children of my son *W. H. Bence*." He declared trusts of the two remaining fifth shares in favour of his daughters *Ellen Amelia* (afterwards Mrs. *Perriam*), and *V. L. Bence* (afterwards Mrs. *Portbury*), and their respective issue in precisely the same way as of the share of Mrs. *Bastin*. Then followed this provision, "And I declare that if any or either of them, the said *W. H. Bence*, *M. R. Bastin*, *E. A. Bence*, and *V. L. Bence* shall depart this life without leaving any lawful issue who shall live to attain a vested interest in their respective shares of the said trust estates and premises, then the share or shares to which such failure of issue shall happen shall remain and be in trust for such other or others of my children as shall be living at the time of such failure of issue and the issue then living of such of them as may be then dead equally as tenants in common, and in the same and in the like manner as nearly as may be as is directed with regard to their original share or shares of my said trust estates and premises."

The testator died in 1857, and his widow in 1871. *William Henry Bence*, who was his heir-at-law, died about the end of 1884 without ever having had a child, leaving a will by which he gave all his property to his widow.

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Mrs. *Perriam* died in March, 1888, leaving a child.

On the 11th of July, 1888, Mr. Justice Kay decided that in the gift over of *W. H. Bence's* share, the words "in default of issue" meant, "in case he shall not have any issue," and that this gift over was not modified by the subsequent gift over relating to the failure of issue of all the children, and that the gift over of *W. H. Bence's* fifth share took effect in favour of the other four children, but as to the share of each daughter, subject to the limitations of her original share, that the limitations of Mrs. *Perriam's* share to her children and issue were void, and that her original fifth and her fourth of *W. H. Bence's* fifth were undisposed of, and devolved on the heir-at-law.

On the 10th of October, 1890, Mrs. *Bastin* died without ever having had a child, and an originating summons was issued by the trustees of the will against the devisee of *W. H. Bence*, Mrs. *Portbury*, and *John Frederick Bence*, to have it ascertained who were now entitled to Mrs. *Bastin's* share.

Kekewich, J., decided that the limitations subsequent to Mrs. *Bastin's* death of her original fifth share, and of her fourth of *W. H. Bence's* share were void for remoteness, and that such fifth share, and fourth of a fifth share, devolved on the testator's heir-at-law.

J. F. Bence appealed.

S. Hall, Q.C., and *Daw*, for the appeal:—

We contend that the gift over is severable into two branches, having no child, and having no child who attains a given age: *Jones* v. *Westcomb* (1) supports this view. *Evers* v. *Challis* (2) is a decisive authority for the severance. It was there held that a gift over "in case of the death of my said son or either of my said two daughters without leaving a child, who, if a son shall live to attain the age of twenty-three years, or if a daughter who shall live to attain the age of twenty-one years" was effectual to carry over the share of a daughter who never had a child.

[FRY, L.J.:—Does that case decide more than this, that if two contingencies are included in one expression, one of which would make the limitation over operate as a contingent remainder,

(1) 1 Eq. C. Ab. 245. (2) 7 H. L. C. 531.

the other as an executory devise, then you may sever the contingencies? This would be carrying out the rule that where a limitation case takes effect as a contingent remainder, it shall not be construed as an executory devise.]

In *Watson* v. *Young* (1), Mr. Justice *Pearson* held that for the purpose of considering whether the clause contained terms which were divisible, it was wholly immaterial whether there was a contingent remainder or not. The case of *In re Harvey* (2) has been referred to against us, but it is inapplicable, for each daughter had a child who died under twenty-one, so the contingency of not having a child did not happen. The Court will lean against a construction which produces intestacy.

A. L. Ellis, for an infant child of a deceased daughter :—

To make the gift over bad it is necessary to give an unnatural meaning to the word "leaving."

Upjohn, for the devisee of the testator's heir-at-law :—

The Appellant contends that the gift over can be split; but the cases are strong to the effect that where there is a gift over on one compound event, which includes events too remote and events not too remote it cannot be split up so as to make it valid in case of the nearer events happening. There is an array of old cases to this effect; but there are two recent cases to which attention may be called: *Miles* v. *Harford* (3), and *In re Harvey*. This rule against splitting up a single expression into its elements is a branch of the rule that in questions as to remoteness you are to look to what may happen not to what does happen. Unless that rule be adhered to, every compound event on which a gift over is made may be split up into its component parts, and it will be impossible to say whether a gift over is bad for remoteness or not until we have waited to see how the events turn out.

[BOWEN, L.J. :—Unless the cases have established a rule to the contrary why should not a gift over be broken up in this way?]

(1) 28 Ch. D. 436. (2) 39 Ch. D. 289.
(3) 12 Ch. D. 691, 702.

C. A. 1891 *In re* BENCE. SMITH *v.* BENCE.

The favour shewn to early vesting is against doing so. If the splitting up were allowed you must always wait for a life in being, and twenty-one years before you could say whether a gift over will take effect or not.

[LINDLEY, L.J.:—If a testator makes a gift over on the happening of any of several events some of which are within the limits, you must wait to see whether those events happen or not. Why may not the same be done when the testator uses a general expression which includes all those events?]

The testator by combining them in one expression shews that he is contemplating one compound event, not a number of separate events. The rule laid down in the cases is connected with the rule that if a gift is void for remoteness a gift over on its failure is void. If this plan of severance is adopted it would go to a great length: see *Ker* v. *Lord Dungannon* (1); *Lord Dungannon* v. *Smith* (2), and see the remarks there against splitting gifts by Baron *Platt* (3), and Lord *Cranworth* (4). There is no logic whatever in splitting a gift over if a direct gift cannot be split.

[FRY, L.J.:—The cases go to this—you cannot split a gift to a class, you cannot split a gift to a person filling a particular character which he may possibly not acquire till after the limit of perpetuity, but do they go to this that you cannot split a gift over?]

Proctor v. *Bishop of Bath and Wells* (5), is against splitting it, and in *Evers* v. *Challis* (6), this case is recognized as good law.

[FRY, L.J.:—May not *Evers* v. *Challis* go on this principle that if a contingency on which a gift over is to take effect admits of being divided and one alternative will make the gift over a contingent remainder, the division shall be made? Lord *Cranworth's* observation (7), seem to point at this.]

When there is a gift over on one event which logically can be split into several, the Courts will not make the division, the

(1) 1 D. & War. 509.
(2) 12 Cl. & F. 546.
(3) Ibid. 562.
(4) 12 Cl. & F. 574.
(5) 2 H. Bl. 358.
(6) 7 H. L. C. 531.
(7) 7 H. L. C. 548.

testator himself not having done so. In *Monypenny* v. *Dering* (1), Lord *St. Leonards* expressly lays this down (2). In *Burley* v. *Evelyn* (3), the Court refused to split a gift over "for default of issue male," so as to make it take effect on the ancestors dying without ever having a child.

[LINDLEY, L.J.:—The Court appears to have held that the testator did not mean the gift over to take effect in that event.

BOWEN, L.J., referred to *Cattlin* v. *Brown* (4), and the observations there on *Proctor* v. *Bishop of Bath and Wells* (5), and *Lord Dungannon* v. *Smith* (6).]

The observations of Lord *Hatherley* there are in my favour. In *Longhead* v. *Phelps* (7), a clear severance was made by the testator himself. A gift over on a general failure of issue has always been held void, and no one ever suggested that it could be split so as to make it good if the person died without ever having issue. The words of gift in the present will shew a clear intention to travel beyond the line of perpetuities, the gift over is on failure of those limitations; and those limitations being void for remoteness the gift over fails. The cases to which I have referred justify the statement of the Master of the Rolls in *Miles* v. *Harford* (8).

[LINDLEY, L.J.:—There is nothing to shew that *Evers* v. *Challis* (9), was present to the mind of the Master of the Rolls.]

I also rely on *In re Harvey* (10), which is clear on the rule not to split. Here the gift over is in terms in case none of the issue of Mrs. *Bastin* take a vested interest. It is a clear gift over on the failure of the whole set of limitations, and some of them being void for remoteness the gift over is void: *Ker* v. *Lord Dungannon* (11); *Evers* v. *Challis* went on the law as to contingent remainders.

[LINDLEY, L.J.:—Why do you say that Mr. Justice *Pearson* was wrong in his view of that case in *Watson* v. *Young* (12)?]

(1) 2 D. M. & G. 145.
(2) Ibid. 183.
(3) 16 Sim. 290.
(4) 11 Hare, 372.
(5) 2 H. Bl. 358.
(6) 12 Cl. & F. 546.
(7) 2 W. Bl. 704.
(8) 12 Ch. D. 691, 702.
(9) 7 H. L. C. 531.
(10) 39 Ch. D. 289.
(11) 1 D. & War. 509, 539.
(12) 28 Ch. D. 436.

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Because all the law lords put the case on a different ground from that taken by him. The case went on the doctrine of contingent remainders; but equitable contingent limitations are not subject to the same rules as legal: *Hopkins* v. *Hopkins* (1). There was no preference at common law for one kind of equitable estate above others. Therefore, the Court will not favour the splitting up of the limitation.

Hall, in reply, referred to *Jones* v. *Westcomb* (2); *Murray* v. *Jones* (3); *Watson* v. *Young* (4).

1891. June 17. FRY, L.J.:—

The testator in this case directed his trustees to stand possessed of one-fifth of his real and personal property in trust for his daughter *Maria* during her life, and after her decease on trusts declared by reference for the benefit of a class which consists of the following persons:—(1) the children of *Maria* who should attain twenty-one, or, being daughters, should attain that age or be married; (2) such of the children of any child of *Maria* who might die under twenty-one as should attain twenty-one, or, being a daughter, be married. It is evident that *Maria* might have a son born after the testator's death, and this son might die before twenty-one, leaving a child who might attain twenty-one, and so become an object of the testator's bounty. It follows that this class includes persons who might not be ascertained till after a life in being and twenty-one years afterwards. Such a gift is plainly void under the well-established rule that a gift to a class is void unless the whole class must be ascertainable within the period allowed by the rule against perpetuities.

The testator has then directed that, if *Maria* should die without leaving any issue who should live to attain a vested interest in their respective shares, then the share given to *Maria* for life should be in trust for such other of his children as should be living at the time of such failure of issue, and the issue then living of such of them as might then be dead.

(1) Cas. t. Tal. 44.
(2) 1 Eq. C. Ab. 245.
(3) 2 V. & B. 313.
(4) 28 Ch. D. 436.

On the 10th of October, 1890, the testator's daughter *Maria* died without having had any issue; and the question is, whether the gift over can take effect. The whole property in question is, we are informed by the Bar, real estate.

The first question is this, Is the event on which the gift over is to operate confined to the death of *Maria*, or does it extend to an indefinite failure of issue? It appears to us that the 29th section of the *Wills Act* does not apply to this gift, because it comes within the proviso to that section which prevents the enactment from extending to cases where the language refers to the event of no issue living to answer the description required for obtaining a vested estate by a preceding gift to such issue. It follows that the old law must apply, and under the well-known case of *Forth* v. *Chapman* (1) it appears to be clear that the gift over is to take effect on an indefinite failure of the vesting in the issue of the issue of *Maria*, an event which might happen either within or beyond the period of a life in being and twenty-one years afterwards.

In the present case we have these circumstances—(*a*) that the particular estate which precedes the remainder in question is limited to a class which may never be ascertained within the limits of perpetuity; (*b*) that the event on which the gift over is to take effect—namely, default of the vesting of the particular estate—may in like manner never be ascertained within these limits; and (*c*) that the class of persons to take under the gift over may never be ascertained within the same limits. These circumstances are, in our opinion, enough to make the gifts over (whether regarded as equitable remainders or as executory devises) *primâ facie* bad. But the argument of the Appellant is that the terms of the gift over can be split up into so many separate gifts over as there are possible events, and that, whenever the actual event falls within the limits of perpetuity the gift over is good; whenever it falls beyond the limit it is bad.

There appears to us to be a great cloud of authorities opposed to this view, amongst which it will be enough to mention: *Proctor* v. *Bishop of Bath and Wells* (2); *Lord Dungannon* v.

(1) 1 P. Wms. 663. (2) 2 H. Bl. 358.

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In re BENCE. SMITH *v.* BENCE.

Fry, L.J.

Smith (1); *Burley* v. *Evelyn* (2); *Monypenny* v. *Dering* (3); *Miles* v. *Harford* (4); *Abbiss* v. *Burney* (5).

The only cases which have been cited as counter-vailing these authorities are those of *Evers* v. *Challis* (6) and *Watson* v. *Young* (7). In the former of these cases the testator gave an estate to his daughter *Ann* for life, with remainder to her sons who should attain twenty-three, and her daughters who should attain twenty-one, with cross remainders between them; and then the testator directed that, in case his daughter *Ann* should die without issue, or in case all the children which his daughter might have should die, if sons under twenty-three, or if daughters under twenty-one, then the estate should go over to persons including the lessor of the Plaintiff. The testator gave another estate in like manner to his daughter *Elizabeth* for life, with similar remainders to her children, and directed that, in case all the children of his daughter *Elizabeth* should die, if sons under twenty-three, and if daughters under twenty-one, or if she had none, then the estate should go over in shares which vested an interest in the lessor of the Plaintiff: both *Ann* and *Elizabeth* died without ever having had any child, so that the event expressed by the testator in regard to *Ann*, of her dying without issue, happened; and in like manner the event expressed in regard to *Elizabeth* of her having no issue also occurred. The case was principally discussed upon the terms of the gift over upon the death of *Elizabeth*, who died first; and it seems to have been held in the Queen's Bench, and Exchequer Chamber, and the House of Lords that there was no difference in the operation of the two gifts over; the gifts over were held good by the House of Lords. The view taken appears to have depended on this, that the limitations over on the death of *Ann* expressed and constituted two gifts; the one, on her dying without issue, which was a remainder; the other on the death of all her children, if sons under twenty-three, if daughters under twenty-one, which would have operated not as a remainder, but as an executory

(1) 12 Cl. & F. 546.
(2) 16 Sim. 290.
(3) 2 D. M. & G. 145.
(4) 12 Ch. D. 691.
(5) 17 Ch. D. 211.
(6) 7 H. L. C. 531.
(7) 28 Ch. D. 436.

devise defeating estates in fee which the House held would have vested in any children whom *Ann* might leave. In like manner, in regard to *Elizabeth*, the testator expressly provided for two events—namely (*a*) the death of *Elizabeth* without ever having had a child, in which case the gift over was a true remainder; and (*b*) the death of all her children, if sons under twenty-three, and if daughters under twenty-one, which, if it took effect at all, would take effect only as an executory devise defeating the estates in fee vested in *Elizabeth's* children on her death. This case, therefore, presented the two circumstances of an expression by the testator of the two contingencies, and of the fact that one of the gifts over in each case could operate as a true remainder, whilst the other could operate only as an executory devise; the events on which the remainders were limited occurred, and the remainders vested, and this vesting, it was held, could not be interfered with by the existence of executory devises limited upon other contingencies.

This case, therefore, in our opinion, proceeds on the application of the well-known principle that a limitation shall, if, and when, and so far as possible, be construed as a remainder rather than as an executory devise, to dispositions so expressed as to sever the remainders from the executory devises. The case is, therefore, no authority for the proposition that every gift over may be analyzed into as many events as are included within its language, and be held good or bad as the events happen. This is shewn, in our opinion, by the language of the learned Lords and of the Judges who advised the House, and especially by their adoption and affirmation of the case of *Proctor* v. *Bishop of Bath and Wells* (1). The gift over in that case was single in point of expression, but in point of fact embraced one event which happened, and on which a perfectly good remainder could have been limited; but, inasmuch as it was not expressly so limited, inasmuch as the event of death without having any issue was not separated from a subsequent event which might transgress the rule against perpetuities, it was held that in that case the limitation over could not operate as a remainder. If the opinion of the late Mr. Justice *Pearson* in *Watson* v. *Young* (2) differs from that

(1) 2 H. Bl. 358. (2) 28 Ch. D. 436.

C. A. 1891 *In re* BENCE. SMITH *v.* BENCE.

above expressed, we are unable to concur with it. For these reasons, we dismiss the appeal with costs.

BOWEN, L.J.:—

I wish to add that I accept the construction of the will which we have adopted, because it seems to me that we cannot depart from it without disregarding authorities by which we are bound.

LINDLEY, L.J.:—

I agree, and for the same reasons.

Solicitors for Appellants: *Coode, Kingdon, & Cotton*, agents for *Hirtzel, Exeter.*

Solicitor for the infant: *Campion.*

Solicitors for the devisee of the heir-at-law: *Moon, Gilks, & Moon.*

H. C. J.

C. A. 1891 STIRLING, J. *Feb.* 21; C. A. *July* 17, 18.

In re TYLER. TYLER *v.* TYLER.

[1890 T. 1653.]

Will—Legacy—Charity—Condition—Tomb—Family Vault—Repairs—Gift Over to another Charity—Perpetuities.

A testator gave a fund to the trustees of charity *A.*, and committed the keys of his family vault in *H.* cemetery to their care and charge, "the same to be kept in good repair, and name legible, and to rebuild when it shall require: failing to comply with this request, the money to go to" charity *B.*:—

Held (affirming *Stirling*, J.), that the condition for the repair, &c., of the family vault was valid, and binding on charity *A.*, and that the gift over, on failure to comply with the condition, to charity *B.* was good, on the principle that the rule against perpetuities has no application to a transfer, in a certain event, of property from one charity to another: *Christ's Hospital* v. *Grainger* (1).

APPEAL from Mr. Justice *Stirling.*

Sir *James Tyler*, who died on the 5th of April, 1890, by his will, dated the 18th of April, 1882, after appointing his brothers,

(1) 1 Mac. & G. 460.

William Tyler and *Charles Tyler*, his executors, made the following bequest:—

"I give to the trustees for the time being of the *London Missionary Society* the sum of £42,000 Russian 5 per Cent. Stock, with a rent-charge to my brother, *Charles Tyler*, Esq., of £1000 a year for life. Also I commit to their keeping of the keys of my family vault at *Highgate Cemetery*, to the (*sic*) care and charge, my brothers to be buried in the vault if they wish, and to use the same, if they wish, for any member of the family, the same to be kept in good repair and name legible, and to rebuild when it shall require: failing to comply with this request, the money left to go to the *Blue Coat School, Newgate Street, London*."

This was an originating summons to obtain the opinion of the Court as to whether (among other questions arising on the will) the condition attached to the above legacy, for keeping up the testator's family vault, was valid and binding on the legatees, the trustees of the *London Missionary Society*.

The summons was heard before Mr. Justice *Stirling* on the 21st of February, 1891.

Hastings, Q.C., and *Micklem*, for the Plaintiff, *William Tyler*, one of the executors and the residuary legatee.

Buckley, Q.C., and *Comyns Tucker*, for the Defendants, the trustees of the *London Missionary Society*:—

The condition which the testator has attempted to attach to the legacy to the *London Missionary Society* is void, and they are entitled to enjoy their legacy discharged from it. A gift or a trust for the perpetual repair of a tomb, not in a church, is altogether bad, because it is not a charitable gift or trust, and it offends the rule against perpetuities: *Hoare* v. *Osborne* (1); *In re Vaughan* (2). If the testator could not make a gift for such a purpose, it is equally incompetent for him to evade the law by imposing a condition that the legacy shall go over in case the legatee omits perpetually to keep the vault in repair.

Moreover, the performance of the condition would entail a misapplication of the funds of the charity and a breach of trust on

(1) Law Rep. 1 Eq. 585. (2) 33 Ch. D. 187.

C. A. 1891 — *In re* Tyler. Tyler *v.* Tyler.

the part of its trustees, and the gift is bad on that ground also: *Mitchel* v. *Reynolds* (1); *Wilkinson* v. *Wilkinson* (2).

Vaughan Hawkins, for the Defendants, the Governors of *Christ's Hospital* (in the will called "the *Blue Coat School*"), contended that the rule against perpetuities had no application to a transfer in a certain event from one charity to another: *Christ's Hospital* v. *Grainger* (3); and that the condition and gift over were therefore good.

Stirling, J.:—

The question I have to consider is, whether the condition attached by the testator to the legacy to the *London Missionary Society* is binding on the trustees of that society, or is void. No doubt a trust or gift for keeping up a tomb not forming part of a church is bad, since such a purpose is not charitable, and the trust or gift creates a perpetuity: *Thomson* v. *Shakespear* (4); *Rickard* v. *Robson* (5); *Hoare* v. *Osborne* (6). Here, however, the question is not whether the gift or trust for the purpose of keeping up the tomb is good or bad, but whether the gift over, in the event of failure to keep in repair, to another charity can be held to be bad. The rule against perpetuities has no application to a transfer in a certain event from one charity to another, as is expressly laid down by Lord *Cottenham* in the case of *Christ's Hospital* v. *Grainge*. It is said that the condition tends to produce or bring about a misapplication of funds devoted to charitable purposes, and the case of *Wilkinson* v. *Wilkinson* was referred to as shewing that the gift must, therefore, be held to be bad. I am, however, unable to see that the condition imposed here tends necessarily to a breach of trust on the part of the trustees of the society. Such societies depend largely on the voluntary contributions of their supporters; and the funds required for keeping the family vault in repair may readily, I doubt not, be obtained from persons willing to subscribe for the purpose of retaining the administration of this large fund in the

(1) 1 P. Wms. 181.
(2) Law Rep. 12 Eq. 604.
(3) 1 Mac. & G. 460, 464.
(4) 1 D. F. & J. 399.
(5) 31 Beav. 244.
(6) Law Rep. 1 Eq. 585.

hands of the society, and without in the least trenching on any funds devoted to charitable purposes.

I am of opinion, therefore, that the condition is good.

W. W. K.

C. A. 1891 *In re* TYLER. TYLER *v.* TYLER.

From that decision the Defendants, the trustees of the *London Missionary Society*, appealed, asking that it might be declared that the condition attached to the legacy was void, and that the gift over of the legacy to the Defendants, the Governors of *Christ's Hospital*, upon the breach of such condition, was not a good gift.

Since the commencement of the proceedings the Plaintiff had died, the Defendant, *Charles Tyler*, thus becoming the testator's sole legal personal representative.

The appeal came on for hearing on the 17th of July, 1891.

C. A.

Buckley, Q.C., and *Comyns Tucker*, for the Appellants:—

Mr. Justice *Stirling* went on the ground of *Christ's Hospital* v. *Grainger* (1), where it was held that a contingent limitation over of property from one charity to another is not within the principle of the rule against perpetuities, because a valid perpetuity is created by the first gift, and so the gift over on an event beyond the limit of perpetuities cannot tend to make the property more inalienable. But in the present case the condition makes the property less alienable; it introduces a fresh element of perpetuity by making it impossible for the society to deal with the fund in the ordinary way. This decision will enable a testator to do indirectly what he could not do directly, namely, to create a perpetual trust for keeping in order a tomb not inside a church. A permanent trust for repair of a tomb not in a church is illegal: *Hoare* v. *Osborne* (2); *Rickard* v. *Robson* (3). A gift over which tends to lead a person to do something against public policy is void: *Wilkinson* v. *Wilkinson* (4). Here the testator resorts to an indirect way of doing what on grounds of public policy cannot be done directly. This is imposing on a legacy a perpetual trust for purposes not charitable; and there is no reason why a trust which would be void for perpetuity if the trustee

(1) 1 Mac. & G. 460.
(2) Law Rep. 1 Eq. 585.
(3) 31 Beav. 244.
(4) Law Rep. 12 Eq. 604.

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were an individual should be valid because the trustee happens to be a charitable body. We say, then, that the limitation over is void. The society intends to accomplish the testator's wish, and to keep the tomb in repair; but they do not wish to be hampered with a legal obligation to do so.

Vaughan Hawkins, for the Defendants, the Governors of *Christ's Hospital*:—

I submit that the gift over is good on the grounds stated by Mr. Justice *Stirling*. I do not dispute the law as laid down in *Hoare* v. *Osborne* (1), but I contend that this case is an exception to the general law of perpetuities, the gift over being from one charity to another, and thus falling within the doctrine of *Christ's Hospital* v. *Grainger* (2). The repair of a tomb is not in itself an illegal object. There is no law, for instance, preventing an association being established for the purpose of keeping tombs in repair in perpetuity by means of voluntary contributions; although it is an object for which the association could not hold permanent endowments. In *Chamberlayne* v. *Brockett* (3) Lord *Selborne* said that when you have once got a fund wholly devoted to charity, as is the case here, you are altogether outside the rule against perpetuities; and giving a fund in that way is quite within the power of a testator. [He was stopped by the Court.]

Micklem, for the Defendant, the surviving legal personal representative of the testator.

LINDLEY, L.J.:—

In this case Sir *James Tyler*, by his will, made a disposition which is not in very artificial language, but it is tolerably plain. It runs thus: "I give to the trustees for the time being of the *London Missionary Society* the sum of £42,000 Russian 5 per Cent. Stock, with a rent-charge to my brother *Charles Tyler*, Esq., of £1000 a year for life. Also I commit to their keeping of the keys of my family vault at *Highgate Cemetery* to the care and charge." Then comes a clause which is parenthetical: "My

(1) Law Rep. 1 Eq. 585 (2) 1 Mac. & G. 460, 464.
(3) Law Rep. 8 Ch. 206.

brothers to be buried in the vault if they wish, and to use the same, if they wish, for any member of the family, the same to be kept in good repair, and name legible, and to rebuild when it shall require."

Leaving out the parenthetical clause as to the brothers, it runs thus: "I commit to their keeping"—that is, the *London Missionary Society's* keeping—"of the keys of my family vault at *Highgate* to the care and charge"—I suppose that means "their" care and charge—"the same to be kept in good repair, and name legible, and to rebuild when it shall require: failing to comply with this request, the money left to go to the *Bluecoat School, Newgate Street, London.*"

Mr. Justice *Stirling* has decided that the condition on which the gift over is to take effect is valid, and the appeal to us is against so much of his order as declares that the condition of repairing and rebuilding the family vault is a valid condition and binding on the Defendants, the *London Missionary Society*; the Defendants asking that that may be reversed.

There is no doubt whatever that this condition, in one sense, tends to a perpetuity. The tomb or vault is to be kept in repair, and in repair for ever. There is also no doubt, and I think it is settled, that a gift of that kind cannot be supported as a charitable gift. But, then, this case is said to fall within an exception to the general rule relating to perpetuities. It is common knowledge that the rule as to perpetuities does not apply to property given to charities; and there are reasons why it should not. It is an exception to the general rule; and we are guided in the application of that doctrine by the case which has been referred to of *Christ's Hospital* v. *Grainger* (1). It is sufficient for me to refer to the head-note for the facts. The bequest there was "to the corporation of *Reading*, on certain trusts for the benefit of the poor of the town of *Reading*, with a proviso that, if the corporation of *Reading* should, for one whole year, neglect to observe the directions of the will, the gift should be utterly void, and the property be transferred to the corporation of *London*, in trust for a hospital in the town of *London*." It was argued that that gift over was invalid, and Lord *Cottingham* disposes of the argument

(1) 1 Mac. & G. 460.

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in this way (1): "It was then argued that it was void, as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of *Reading* might hold the property for certain charities in *Reading*, why may not the corporation of *London* hold it for the charity of *Christ's Hospital* in *London*? The property is neither more nor less alienable on that account."

Guided by that decision, and acting on that principle, Mr. Justice *Stirling* held that this condition was a valid condition; and it appears to me that he was right. What is this gift when you come to look at it? It is a gift of £42,000 Russian 5 per Cent. Stock to the *London Missionary Society*. What for? It is for their charitable purposes. It is a gift to them for the purposes for which they exist. Then there is a gift over to another charity in a given event—that is to say, the non-repair of the testator's vault. It seems to me to fall precisely within the principle on which *Christ's Hospital* v. *Grainger* (2) was decided. A gift to a charity for charitable purposes, with a gift over on an event which may be beyond the ordinary limit of perpetuities to another charity—I cannot see that there is anything illegal in this. Mr. *Buckley* has put it in the strongest way he can. He says that, if you give effect to this condition, you will be enabling people to evade the law relating to perpetuities. I take it this decision will not go the length—certainly I do not intend it should, so far as I am concerned—that you can get out of the law against perpetuities by making a charity a trustee. That would be absurd; but that is not this case. This property is given to the *London Missionary Society* for their charitable purposes. Then, there is a condition that, if the tomb is not kept in order, the fund shall go over to another charity. That appears to me, both on principle and authority, to be valid; and I do not think it is a sufficient answer to say that such a conclusion is an inducement to do that which contravenes the law against perpetuities. There is nothing illegal in keeping up a tomb; on the contrary, it is a very laud-

(1) 1 Mac. & G. 464. (2) 1 Mac. & G. 460.

able thing to do. It is a rule of law that you shall not tie up property in such a way as to infringe what we know as the law against perpetuities; but there is nothing illegal in what the testator has done here. The appeal must be dismissed with costs.

FRY, L.J.:—

I am of the same opinion.

In this case the testator has given a sum of money to one charity with a gift over to another charity upon the happening of a certain event. That event, no doubt, is such as to create an inducement or motive on the part of the first donee, the *London Missionary Society*, to repair the family tomb of the testator. Inasmuch as both the donees of this fund, the first donee and the second, are charitable bodies, and are created for the purposes of charity, the rule of law against perpetuities has nothing whatever to do with the donees. Does the rule of law against perpetuities create any objection to the nature of the condition? If the testator had required the first donee, the *London Missionary Society*, to apply any portions of the fund towards the repair of the family tomb, that would, in all probability, at any rate, to the extent of the sum required, have been void as a perpetuity which was not charity. But he has done nothing of the sort. He has given the first donee no power to apply any part of the money. He has only created a condition that the sum shall go over to *Christ's Hospital* if the *London Missionary Society* do not keep the tomb in repair. Keeping the tomb in repair is not an illegal object. If it were, the condition tending to bring about an illegal act would itself be illegal; but to repair the tomb is a perfectly lawful thing. All that can be said is that it is not lawful to tie up property for that purpose. But the rule of law against perpetuities applies to property, not motives; and I know of no rule which says that you may not try to enforce a condition creating a perpetual inducement to do a thing which is lawful. That is this case.

Then it is said by Mr. *Buckley*, "But if the gift had been to the *London Missionary Society* simply, they might have spent the money; by imposing this condition you require them to keep

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that invested, because it may have to go over at any moment to *Christ's Hospital*." What is the harm of that? Being a charity, and not affected by the rule against perpetuities, whether you direct them to keep the money invested in plain words, or whether you impose the condition which renders it necessary to keep it invested, seems to me the same thing and to be equally harmless, and not affected by the law against perpetuities.

I think the learned Judge in the Court below was quite right, and that this appeal must be dismissed.

LOPES, L.J.:—

I am of the same opinion.

Solicitors: *Leonards & Slater Pilditch; Beachcroft; Gard, Hall, & Rook.*

G. I. F. C.

C. A. 1891 *July* 18.

In re OPERA, LIMITED.

Company—Winding-up—Debenture-holders—Floating Security—Execution Creditor—Sheriff—Priority.

The sheriff, on seizing, on behalf of an execution creditor, goods belonging to a limited company, takes—at all events before sale by him—subject to the rights of debenture-holders under debentures charging all the property of the company as security for the debenture debt: *In re Standard Manufacturing Company* (1).

But whether, after sale by the sheriff, the debenture-holders lose their priority, *quære.*

At the time of the presentation of a petition for winding up a limited company, the sheriff was in possession of goods of the company which he had seized under writs of *fi. fa.* These goods were covered by debentures charging all the company's undertaking and property as a floating security for the debenture debt. Subsequently to the presentation of the petition the sheriff gave up possession of the goods, and, a winding-up order having been made, they were sold by the official liquidator, who retained the proceeds.

Upon a summons by the sheriff against the liquidator and the debenture-holders, to have the judgment debts and costs paid out of the proceeds of sale:—

Held (reversing *Kekewich*, J.), that the sheriff was not entitled to be

(1) [1891] 1 Ch. 627, 640-1.

paid in priority to the debenture-holders, and the summons was accordingly dismissed with costs, but without prejudice to any application by the sheriff for payment of his claim out of any money in the hands of the liquidator not subject to or charged by the debentures.

THIS was a consolidated appeal by the official liquidator and the debenture-holders of the above company from the decision of Mr. Justice *Kekewich* (1).

The appeal was heard on the 18th of July, 1891.

Marten, Q.C., *E. Beaumont*, and *Manby*, for the liquidator and debenture-holders :—

The first objection we take to the decision of the learned Judge below is that the position of the debenture-holders in the matter has not been sufficiently regarded. Our contention is that the debenture-holders have, by virtue of their security, a clear priority over the claim of the sheriff on behalf of the execution creditors. In the recent case of *In re Standard Manufacturing Company* (2), the Court of Appeal stated, in the course of the argument on that particular point (3), that the rights of a debenture-holder are superior to those of an execution creditor. It is clear from the reports of the case that the statements so made by the Court amount to an actual decision on that point.

[FRY, L.J. :—Is there any case reported in which the right of the debenture-holder has been postponed to that of the execution creditor?]

There is no such case to be found.

[LINDLEY, L.J. :—We think the observations of the Court of Appeal in *In re Standard Manufacturing Company* do constitute a clear decision that the execution creditor takes subject to the equity of the debenture-holders. We desire to hear the counsel for the sheriff on that point.]

Warmington, Q.C., and *Vernon R. Smith*, for the sheriff :—

We admit that, if the observations of the Court in the course of the argument in *In re Standard Manufacturing Company*, are to be treated as an actual decision, it is difficult to see how

(1) [1891] 2 Ch. 154. (2) [1891] 1 Ch. 627; 60 L. J. (Ch.) 292.
(3) [1891] 1 Ch. 639, 640-1.

C. A. 1891 *In re* OPERA, LIMITED.

the order now appealed from can be supported. But in that case the debentures were in a particular form, which the Court thought gave the debenture-holders an overriding charge. Here the debenture-holders are really represented by the official liquidator; so that, as the learned Judge below pointed out, they are in no better position than the ordinary creditors. At all events, the debenture-holders cannot claim the money now in the hands of the liquidator, representing the takings received by the sheriff at the doors of the theatre from the 18th to the 27th of January, for those moneys constituted the earnings of the company from day to day, in the ordinary course of the business, and as such were applicable to the payment of the debts of the company while a going concern: *Willmott* v. *London Celluloid Company* (1); *In re Panama, New Zealand, and Australian Royal Mail Company* (2).

It is extremely hard on the sheriff that he should suffer through having, in order to enable the company to carry on its business, given up possession of the goods he had rightfully seized.

Marten, in reply:—

The decision of the Court of Appeal in *In re Standard Manufacturing Company* (3), that debenture-holders are entitled to priority over an execution creditor, completely covers this case. The question of the right to the money said to represent earnings is not raised by the summons upon which the order now appealed from was made. The summons relates only to the moneys received for the sale of the goods seized by the sheriff, and that is the only point we have to meet.

[FRY, L.J.:—Looking at the form of the order appealed from, it seems clear that the question of the right to the takings is not raised.

LINDLEY, L.J.:—The proper course seems to be to allow this appeal without prejudice to any fresh application which the sheriff may hereafter make for payment out of moneys not comprised in the debentures.]

(1) 34 Ch. D. 147. (2) Law Rep. 5 Ch. 318, 322.
(3) [1891] 1 Ch. 627.

I do not object to those words being inserted in the order, though I do not admit that there are any such moneys.

LINDLEY, L.J.:—

I do not think we need trouble you any further, Mr. *Marten*.

This appeal is against an order of Mr. Justice *Kekewich*, directing the liquidator to pay, out of the moneys received by him from the sale of the property of the company seized by the sheriff under two writs of *fi. fa.*, the amounts mentioned in such writs with costs. When that order comes to be scanned and criticised, it appears that there is considerable difficulty about it, because I think the order itself and the judgment of the learned Judge, as reported, do not recognise what appears to be the fact, namely, that the goods there referred to are comprised in the security of the debenture-holders; and, after the decision in *In re Standard Manufacturing Company* (1), it seems tolerably plain and settled that the rights of the holders of debentures must prevail even as against the execution creditor, at least before sale. What the position of the debenture-holders is after the property is sold and the money handed over, I do not know, and I will not say at this moment; but, bearing in mind that these goods were comprised in the security, it is obvious, I think, and it is practically conceded, that the order in the form in which it now stands is erroneous. That does not conclude the case, because it may be that the sheriff is entitled to have the judgment debt repaid by the liquidator out of such of the assets of this company, if there are any, as are not comprised in the debentures; and Mr. *Marten* does not object to our discharging the order of the Court below without prejudice to any fresh application which the sheriff may make for payment by the liquidator out of property not comprised in the debentures, if there is any. Whether there is any or not, we are not at present in a position to decide. If Mr. *Warmington's* argument is correct, it is possible that some of the money which the liquidator has may be applicable to the payment of the claim of the sheriff. With the reservation I have indicated, I think the appeal ought to be allowed. The order as it stands is erroneous, because it overlooks the rights of the debenture-holders.

(1) [1891] 1 Ch. 640-1.

C. A. 1891 *In re* OPERA, LIMITED.

FRY, L.J.:—

I am of the same opinion. It is impossible not to feel some sympathy with the sheriff in this case, because he appears to have acted with great consideration, and with a desire to prevent unnecessary injury to the Opera. But at the same time it is impossible to give effect to this sympathy for the sheriff at the expense of the owners of a legal or equitable charge upon the property of the company, who in no way influenced or induced the sheriff to do what he did.

Now, the order of the learned Judge has directed repayment to the sheriff of the money that has been retained by the liquidator being money representing property which, it is conceded at the Bar, belonged to the debenture-holders—in other words, that the debenture-holders are to pay for something that was not done at their instance or by their request. I think, therefore, that all we can do is to discharge the order, reserving to the sheriff liberty to apply hereafter, if so advised, for repayment from any money coming to the hands of the official liquidator which is not subject to or charged by the debentures of the company.

LOPES, L.J.:—

The order of Mr. Justice *Kekewich* overlooks the rights of the debenture-holders, whatever they may be, and I think, therefore, that the order cannot stand.

Appeal allowed, with costs both below and on appeal.

Solicitors: *Lewis & Lewis; Boxall & Boxall.*

G. I. F. C.

GUARDIANS OF TENDRING UNION *v.* DOWTON.

C. A. 1891 July 21.

[1889 T. 1348]

Local Government Acts—Street Improvement—Expenses of Paving—"Owner"—Charge on Premises—Sale of Premises free from restrictive Covenant—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257 [*Revised Ed. Statutes, vol. xvii., pp.* 567, 602].

The word "owner" in the sects. 150 and 257 of the *Public Health Act*, 1875, does not include a person who has the benefit of a covenant restricting the use of the premises in respect of which expenses for street improvement have been incurred. Therefore, where a local authority had obtained a charge under sect. 257 on a piece of land, which was subject to a covenant restricting the owner thereof from building on it, it was *held*, reversing the decision of *Stirling*, J., that they were not entitled to an order for sale of the land free from such restrictive covenant.

Corporation of Birmingham v. *Baker* (1) distinguished.

THIS was an appeal from a judgment of Mr. Justice *Stirling* upon admissions in the pleadings (2).

The allegations in the statement of claim, which are given fully in the previous report, were shortly as follows:—

The Defendant *Dowton* was the owner in fee of a triangular piece of land fronting or abutting on *Anglefield Road*, at *Great Clacton*, *Essex*, subject to a covenant restricting him, his heirs and assigns, from building thereon. The Defendant *Simon* was one of the persons who were entitled to the benefit of this covenant; and had been appointed by the Court to represent all the persons so interested.

On the 20th of March, 1886, the Plaintiffs, who were the local sanitary authority, served notice, under sect. 150 of the *Public Health Act*, 1875, on the owners and occupiers of the premises adjoining *Anglefield Road*, requiring them to level, pave, metal, flag, and channel it.

The notices not being complied with by the owners and occupiers, the Plaintiffs executed the works themselves, and completed them on the 5th of February, 1887. The Plaintiffs then apportioned the sums expended by them amongst the several owners, the proportion payable by *Dowton* being £131 1*s.* 9*d.*

(1) 17 Ch. D. 782. (2) 45 Ch. D. 583.

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GUARDIANS OF TENDRING UNION v. DOWTON.

Dowton did not dispute the apportionment, and the Plaintiffs obtained an order for payment of the sum due from him with interest and costs.

Subsequently the Plaintiffs obtained a warrant of distress against *Dowton's* goods; but none were found to satisfy the warrant, and they then brought the present action, claiming, first, that the sum of £131 1*s.* 9*d.* with interest and costs might be declared a charge on the premises in question; and secondly, that the premises might be sold free from the restrictive covenant above mentioned, and the sum claimed paid to them out of the proceeds of the sale. The Defendant *Dowton* did not appear.

Mr. Justice *Stirling* made the declaration asked for, and ordered the premises to be sold free from the restrictive covenant, and the Defendant *Simon* appealed from his decision (1).

(1) The following are the material sections of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55):—

Sect. 4: "'Owner' means the person for the time being receiving the rackrent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

Sect. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . is not sewered, levelled, paved . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved . . . require them to sewer, level, pave . . . the same within a time to be specified in such notice . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act . . . "

Sect. 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per cent. per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

Hastings, Q.C., and *Ingpen*, for the Appellant.

Buckley, Q.C., and *Macmorran*, for the plaintiffs, relied on *Corporation of Birmingham* v. *Baker* (1).

LORD HALSBURY, L.C.:—

I am not able to agree with the decision arrived at by Mr. Justice *Stirling*. It is clear that the Plaintiffs have no right to any charge on the premises, except so far as it is given by the provisions of the statute; and both the language of the 257th section and the frame of the statute appear to me irreconcileable with the contention of the Plaintiffs. [His Lordship read the 257th section, so far as it is set forth above.] Now, who is to pay the expenses which have been incurred? It is not denied that the owner is the person primarily liable. Then what is the meaning of the words: "The same shall be a charge upon the premises"? To ascertain this we must look further into the Act, and we find that, by section 150, notice is to be served on the owners and occupiers of the houses, and that the local authority may recover the amount of the expenses from the owners in the proportion settled by the surveyor. Therefore, it is clear that the person against whom the judgment is to stand is the owner. Indeed, the whole machinery of the Act shews that the owners and occupiers are the persons against whom the proceedings are to be taken. There can be no doubt as to the meaning of the statute with respect to the word "owner." It includes all persons who have an interest in the property. The *Corporation of Birmingham* v. *Baker* has been relied on by Mr. Justice *Stirling*; but with great respect for the learned Judge, I think that the very language which the Master of the Rolls used in that case shews that he would have repudiated the contention of the Plaintiffs in the present case. He says (2): "The works in question are an improvement to the property, not to the interest of any particular owner of the property, but of every owner of the houses; and consequently there is no good reason in the world why there should not be a charge on the property, that is, on the respective interest of every owner of the

(1) 17 Ch. D. 782, 785. (2) 17 Ch. D. 785, 786.

C. A. 1891 GUARDIANS OF TENDRING UNION v. DOWTON. Lord Halsbury, L.C.

property according to the value of his ownership." And then he goes on to say: "If there be a charge on the houses it is a charge on the total ownership—if I may call it so, on the proprietorship; not on any particular section or portion of the proprietorship, but on the whole. In an ordinary case, in the absence of any covenants, it should be borne by every proprietor in proportion to his interest in the house." And that is intelligible, for they all have the benefit of the money expended. But here we are asked to include in the proprietorship persons who have no interest in the property in a legal sense, but who have an interest in other premises, and who have taken a covenant from some of the owners of the property in question that it shall not be used for certain purposes; and the Plaintiffs now ask for a declaration that the property should be sold free from the liability under this covenant. It may be that it would be desirable to have a declaration as to the rights of the parties to the purchase-money; but that is not the question on this appeal. What the Plaintiffs ask for is a sale free from this restrictive covenant. I am startled by the unreasonableness of putting such a construction on the section, and the result of my construction of the statute is that there is no foundation for making the order in the form in which it has been made. The order for a sale is quite right, but the powers of the statute cannot be extended to support an order of this kind.

LINDLEY, L.J.:—

I am of the same opinion. The Plaintiffs ask that in order to satisfy their charge, the premises in question may be sold free from the covenant to which they are subject, namely, that they shall not be used for building purposes. Mr. Justice *Stirling* has declared that the sum of £131 1*s.* 9*d.* is charged upon the premises; and, further, that the charge overrides the restrictive covenant. It is obvious that the learned Judge has not arrived at this conclusion from consideration only of the language of the statute, but that he supposed that he was following the decision of Sir *G. Jessel* in the *Corporation of Birmingham* v. *Baker* (1), where it was held that such a charge has priority over all other

(1) 17 Ch. D. 782.

charges on the property; but the circumstances in the present case are different. The Appellant is entitled to the benefit of a covenant which prevents the owner of the property from building on it. Can this case be brought within the principle of the decision which I have referred to, or within the words of the Act of Parliament? If the Appellant had any estate in the land that decision might have applied, but he has nothing of the kind. Mr. Justice *Stirling* saw a difficulty in the case of an ancient easement; but the Plaintiffs here contend that all rights must be destroyed by the powers of the Act of Parliament. We cannot put such a construction on the Act. The order appealed from must be discharged.

FRY, L.J.:—

I am of the same opinion. I think there is nothing to justify a declaration that the charge overrides the restrictive covenant. All the Act does is to create a charge on the premises—that is, on the land—that is, on all the interests of the owners of the land. But here we have to deal with the rights of a person against the owners of the land. The learned Judge relied on the authority of the *Corporation of Birmingham* v. *Baker* (1), but there is nothing in that case which governs the present one. The Master of the Rolls was not dealing with such a right as this at all, but with interests in the land. Great injustice might be done by local boards, if the construction contended for could be put upon the statute. They might use the machinery of the Act for the purpose of getting rid of all rights in the land. Unless the Legislature has expressly said they may do this, they have no such power; and I can find nothing in this Act to justify such an order. The appeal must be allowed.

Solicitors: *Oldman & Clabburn*, agents for *R. S. Daniel, Manningtree; Chamberlayne.*

(1) 17 Ch. D. 782.

M. W.

C. A.
1891
July 22.

BOLTON *v.* BOLTON.

[1873 B. 306.]

Ward of Court—Marriage after attaining Twenty-one—Settlement—Contempt—Jurisdiction.

A gentleman obtained leave of the Court to pay his addresses to a ward of Court on an undertaking that he would abide by the directions and orders of the Court. No directions were given or applied for; but after the lady came of age she made a settlement of her property, giving a joint power of appointment to husband and wife in priority to the other trusts, and the marriage was arranged to take place without the consent of the Court:—

Held, that the gentleman would not be committing a contempt in marrying the lady, and that the Court had no jurisdiction to restrain the parties from marrying, or the lady from disposing of her property as she pleased.

THIS was an appeal from orders of Mr. Justice *North*, made on the 6th and 8th of July, 1891, restraining Mr. *Frank Russell* from marrying Miss *Evelina Mary Bolton*, who had been until recently a ward of Court. The facts were shortly as follows:—

Miss *Bolton* was entitled to a considerable sum of money, expectant on the death of her father, under her grandfather's will. Her grandfather's estate was being administered by the Court in the action, to which Miss *Bolton*, while still an infant, was made a party by her father as guardian *ad litem*. In 1889 Miss *Bolton*, being nineteen years of age, with the approval of her father, became engaged to Mr. *Russell*, who was a commercial traveller in a good position, earning £300 a year; and by an order of the Court, dated the 9th of November, 1889, Mr. *Russell* was permitted to visit and pay his addresses to Miss *Bolton*, with a view to his subsequently making proposals to the Court for marriage. Mr. *Russell*, in his affidavit in support of the application on which this order was founded, said: "If this Honourable Court should see fit to permit me to visit and pay my addresses to her, I undertake to do so as becomes a gentleman and an honourable man, and in all respects to abide by the directions and orders of this Honourable Court."

Miss *Bolton*, being anxious to find her proposed husband some money to start him in business on his own account, consulted her father's solicitor, and he advised her to wait till she came of age, which would be on the 2nd of July, 1891, as otherwise the Court would insist upon her property being put into strict settlement, which would prevent her from assisting her husband with any present advance. The parties accordingly agreed to be married on the 8th of July, six days after Miss *Bolton* came of age. Miss *Bolton's* father wrote to her and to Mr. *Russell*, warning them that they should do nothing without the consent of the Court, and he received replies from both of them which he did not consider satisfactory. He accordingly took out a summons on the 25th of June for directions in reference to the contemplated marriage; but before the summons could be heard, Miss *Bolton* came of age.

On the 6th of July, 1891, Mr. Justice *North* made an order restraining the parties from intermarrying; and on the 8th of July he dismissed an application which had been made to discharge that order. The ground on which the order of the Court was made, as appeared on the face of the order, was that a settlement had been executed by Miss *Bolton* as soon as she came of age, by which an absolute power of appointment was limited to herself and her intended husband jointly in priority to the other trusts of the settlement. Miss *Bolton* and Mr. *Russell* appealed from these orders.

Vernon R. Smith, for the Appellants:—

The Court has no jurisdiction to restrain a ward of Court, after she comes of age, from marrying whom she pleases, or from disposing of her property as she pleases, if there has been no contempt in the marriage: *Ball* v. *Coutts* (1); *White* v. *Herrick* (2). The order was made on the ground that Mr. *Russell* had committed a contempt by breaking his undertaking to obey any order of the Court as to his proposals to the lady; but, in the first place, the undertaking was only intended to last so long as the Court had jurisdiction over the person and property of the lady—namely, while she was a ward of the Court; and, in the second place, the

(1) 1 V. & B. 300. (2) Law Rep. 4 Ch. 345.

C. A. 1891 BOLTON v. BOLTON.

effect of the order would be to restrain the actions not only of the gentleman but of the lady.

Oswald, for Miss *Bolton's* father, supported the appeal.

LINDLEY, L.J.:—

This is an appeal from two orders of Mr. Justice *North*, by one of which he granted an injunction restraining Mr. *Russell* and Miss *Bolton* from intermarrying, and by the other he refused to dissolve the injunction. The case is peculiar. The lady was a ward of Court in 1889; while she was an infant, Mr. *Russell* obtained permission to pay his addresses to her. On that occasion he filed an affidavit, in which he stated that if he were permitted to pay his addresses to the lady, he would in all respects abide by the directions and orders of this Court. On this affidavit the order was made. No proposals were made to the Court by Mr. *Russell* as to a marriage, but a summons was taken out by the lady's father on the 25th of June, 1891, for directions as to the marriage. Nothing was done under the summons till after the lady attained twenty-one, which was on the 2nd of July, 1891. Shortly after she came of age she executed a settlement by which she assigned her property to trustees, upon such trusts as she and her intended husband should jointly appoint, and in default of such appointment as the survivor should appoint, and in default of such appointment upon certain trusts for the benefit of them and their children. The application now made is to discharge the injunction which has been granted. It was contended by the Appellants that they have done nothing to justify the Court in restraining them from marrying, that the Court has no jurisdiction over the lady's person or property after she came of age, and that consequently she was at liberty to marry and to make such settlement as she chose. It occurred to us at first that we might restrain the parties from marrying, except on the terms of a proper settlement being made, by reason of the undertaking given by Mr. *Russell* in 1889, to abide by the directions and orders of the Court; but I think the answer given to that by Mr. *Vernon Smith* was satisfactory, namely, that the

undertaking was only intended to apply to an order made by the Court while the Court had jurisdiction to make such an order. A further objection to the injunction is that it is impossible for the Court to restrain the gentleman from marrying without restraining the lady, which we have now no jurisdiction to do. The appeal must, therefore, be allowed.

FRY, L.J.:—

It is admitted that the Court has now no jurisdiction over the lady or her property. The only difficulty arises from the undertaking given by Mr. *Russell* with a view to proposals being made to the Court, which would have given the Court jurisdiction in the matter. But these proposals were never made before the lady attained twenty-one. I think the construction which has been put upon the undertaking is the natural one. If the undertaking had been intended to apply to orders of the Court made after the ward had attained twenty-one, more explicit language would have been used. Even if the undertaking gave jurisdiction to this Court to interfere, I do not think we ought to exercise it, because that would in effect be to control the lady's power to dispose of her own property as she thinks fit.

LOPES, L.J.:—

I am of the same opinion. The Court has no jurisdiction to restrain the lady from marrying, or to interfere with her power over her own property. The only difficulty arises from the undertaking contained in Mr. *Russell's* affidavit. But I think it was only intended to last so long as the lady was a ward of Court, and therefore under the control of the Court.

Solicitors: *Read & Cripps; A. J. Ford.*

M. W.

C. A.
1891
July 20, 24.

In re B—— (AN ALLEGED LUNATIC).

Lunacy—Petition for Inquiry—Pending Proceedings—Application for Examination of alleged Lunatic—Opposition by alleged Lunatic.

An order upon an alleged lunatic to submit to an examination ought not to be made against his will without great caution nor without real necessity; and whilst there is jurisdiction for the Master, and, if necessary, for the Court, to make such an order, no such order ought to be made by the Court adversely to a person, pending an inquiry into his state of mind, unless the Master or other person conducting the inquiry informs the Court that its order is necessary to enable him to come to a decision upon the subject.

Whether a Master can enforce such an order when made by him in a case where there is no jury, *quære*.

THIS was a petition in lunacy presented by a husband living apart from his wife for an inquiry into his wife's state of mind. The Respondent, the wife, had already been examined personally by the Master; and before the close of the Petitioner's case an application was made on his behalf for a compulsory order that the Respondent should submit to an examination by two medical men appointed by him.

Lopes, L.J., doubted whether there was jurisdiction to make the order, and adjourned the application into Court.

Lyttelton, for the Petitioner, in support of the application, referred to *In re —— an alleged Lunatic* (1), and *In re Gilbert Scott* (2).

Costelloe, and *Colam*, for the alleged lunatic:—

There is no precedent for this application. The lady, who is of ability to manage her own affairs, objects to being examined in this way. Her grounds of objection are that the proceedings have not been taken in good faith, and that the real object of the present application is to improve the Petitioner's case, and to endeavour to establish out of her mouth a case which he is unable to prove by his own evidence.

[FRY, L.J., referred to *In re Princess Bariatinski* (3).]

(1) 18 Ch. D. 26. (2) Unreported. (3) 1 Ph. 375.

There is no jurisdiction to compel an alleged lunatic to submit to an examination against his own will, while an inquiry into his state of mind is pending. The Court will not make an order which it is not in a position to enforce.

July 24. The judgment of the Court (Lords Justices *Lindley* and *Lopes*) was delivered by Lord Justice *Lindley*.

LINDLEY, L.J. (after stating the facts of the case, continued) :—

In the absence of any actual precedent, we must decide this case upon principle, being guided by such authorities as can be found to throw any light upon the question. The form of the commission to the Master is given in *Elmer* on Lunacy (1). The old writ to the Escheator is given in *Fitzherbert's Natura Brevium* (2). That writ gave him very extensive powers.

The duty of the Master is to inquire into the state of mind of the alleged lunatic; and in order to perform that duty he has conferred upon him very extensive powers, quite independently of the *Lunacy Act*, 1890, ss. 111, 112. He has power to summon witnesses: sect. 114, and *Ex parte Lund* (3); and to require the alleged lunatic to come before him, and to order persons in whose custody the alleged lunatic may be to produce him: *Ex parte Southcot* (4). The jury, if there is one, ought to see the alleged lunatic. In order to inconvenience him as little as possible, sometimes one or two of the jury see him and report to the rest: *Ex parte Smith* (5); but, in strictness, the supposed lunatic is entitled to the judgment of all the jurors. However, orders for the examination of the supposed lunatic by some only of the jury have been made; and Lord *Eldon* said this was not uncommon in his time. See also the cases collected in *Shelford* on Lunacy (6).

The inquisition states that the alleged lunatic has been personally examined by the Master where there is no jury: *Elmer* on Lunacy (7); though the form on page 149 applicable to a jury does not say that the jury have personally examined him.

(1) 6th Ed. p. 144.
(2) Page 233.
(3) 6 Ves. 781, 784; *Elmer*, pp. 17, 146.
(4) 2 Ves. Sen. 405.
(5) 1 Swans. 4, 7.
(6) Page 101.
(7) 6th Ed. p. 148.

C. A. 1891 *In re* B—— (AN ALLEGED LUNATIC).

Whether a Master can order an alleged lunatic to come before him and submit to be examined by medical men appointed by the Master for the purpose is not so clear as might be desired. But the Lord Chancellor, or the Lords Justices, can make such an order, as appears from the case of one *Bagster, alias Newton*, the order in which is given in *Shelford* on Lunacy (1), and also from the *Anonymous Case* (2), where, however, the order was made before the inquisition was directed: see also *per* Lord *Tenterden* in *Anderson* v. *Burrows* (3), as to the power of the Lord Chancellor to make such orders. Another order made by the Lord Chancellor for the production of the alleged lunatic for examination will be found in Mr. *Shelford's* book (*Re Fletcher* (4)); but this was apparently made at the instance or on behalf of the alleged lunatic himself. Upon principle, however, I do not see how a power to make a similar order can be denied to a Master by whom an inquiry has to be made, if he finds that he cannot complete his inquiry without such assistance. Sect. 92 of the *Lunacy Act*, 1890, appears to me to confer such a power by necessary implication where there is no jury. Where there is one I cannot myself doubt that the power exists independently of the statute. An examination in private could not, however, render a report by the examiners admissible in evidence against the alleged lunatic. The examiners would have to be sworn and examined in the usual way before their testimony could be used on the inquiry.

One other point seems obscure, and that is whether a Master can enforce orders made by him. Sect. 99 of the *Lunacy Act*, 1890, confers on him the powers of a Judge of the High Court if there is a jury, and this involves a power to commit for disobedience to an order; but in other cases it may be still necessary to follow the precedent in *Re Holmes* (5), where the Lord Chancellor made an order to enforce a Master's summons.

In the present case the Court is not asked to come to the assistance of the Master. It is not he, but the Petitioner, who is the applicant both in substance and in form. The Master is in

(1) Pages 656, 657.
(2) 18 Ch. D. 26.
(3) 4 Car. & P. 210, 214.
(4) Pages 98, 99.
(5) Shelford, 661 and 99 t.

no difficulty; but the Petitioner wishes to improve s case, and applies to this Court to assist him in getting up his evidence. This is what the Court ought not to do. In *Ex parte Lyttleton* (1) Lord *Eldon* refused to make an order for the examination of an alleged lunatic, the object of the applicant being to obtain evidence that he was incapable of exercising a power. That case shews that such orders will not be made simply on the ground that the applicant has an interest in the matter, and that the order would benefit him.

Reliance was placed by counsel for the Applicant on the case of *Gilbert Scott*, but there was no opposition by or on behalf of the alleged lunatic in that case. In the *Anonymous Case* (2) there was also no opposition to the examination of the alleged lunatic by the petitioner's medical witnesses. The opposition was to their seeing the alleged lunatic in the absence of her medical witnesses. Leave to see her alone was, however, granted. In *In re Princess Bariatinski* (3) an order for an inquiry was made with liberty for a half-brother of the alleged lunatic (who opposed the order) to attend and have access to her in company with a medical gentleman to prepare for the investigation. This order, it is plain, was not made in opposition to the wishes of the alleged lunatic. These are the nearest cases that we can find; but they do not go to the length to which the Applicant asks us to go in the present case.

An order upon an alleged lunatic to submit to an examination ought not to be made against his will without great caution, nor without real necessity; and, whilst I do not doubt that such an order can be made by the Master and if necessary by this Court, no such order ought to be made by this Court adversely to a person pending an inquiry into his state of mind unless the Master, or other person conducting the inquiry, certifies to the Court, or otherwise informs it, that its order is necessary to enable him to come to a decision upon the subject.

This application must, therefore, be dismissed with costs.

Solicitors: *Irvine & Co.; Lickorish & Bellord.*

(1) 6 Ves. 7. (2) 18 Ch. D. 26. (3) 1 Ph. 375.

W. W. K.

C. A.
1891
KEKEWICH, J.
July 10;
C. A.
July 29.

PROTHEROE *v.* TOTTENHAM AND FOREST GATE RAILWAY COMPANY.

[1891 P. 1516.]

Railway Company—Deposited Plans—"Delineated"—Land not inclosed on every side by Lines.

The Plaintiffs were tenants of a nursery ground, through the S.W. part of which ran the central line of an intended railway, as shewn on the deposited plans. Only the S.W. boundary and part of the S.E. boundary of the nursery ground were delineated on the plans, the latter being carried to a point a little to the N.E. of the N.E. limit of deviation, and the paths in the ground were carefully delineated and carried on to short unequal distances beyond the same limit. The company gave the Plaintiffs notice to treat for a strip of land bounded on the N.E. by an imaginary line beyond, and distant about a chain and a half from, the N.E. limit of deviation. If this line had been traced on the plan, the tracings of the outer boundary of the nursery ground, and those of nearly all the paths, would have stopped short of it. The Plaintiffs applied for an injunction to restrain the company from taking any ground to the N.E. of the N.E. limit of deviation, as not being delineated on the plans:—

Held, by the Court of Appeal (reversing the decision of *Kekewich*, J.), that nothing to the N.E. of the limit of deviation could be considered to be "delineated" on the plan, and that the company could not take compulsorily anything beyond that limit.

When a company seek to obtain power to acquire a limited portion only of a piece of land of great extent which is not broken up into closes, they must frame their deposited plans in such a way as to shew how much of it they mean to acquire power to take.

Dowling v. *Pontypool, Caerleon, and Newport Railway Company* (1), discussed.

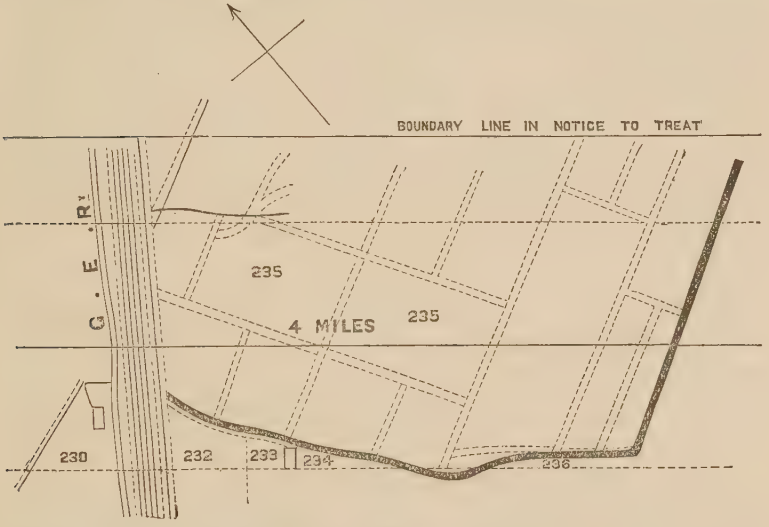
THIS was an action by the lessees of a nursery ground to restrain the Defendant company from proceeding on a notice to treat, and a subsequent notice founded on it, so far as regarded the Plaintiffs' interest in such part of the land comprised in the notice as was not delineated on the deposited plans and described in the book of reference, and was not within the limits of deviation marked on the plans.

By the *Tottenham and Forest Gate Railway Act*, 1890, s. 5, it was enacted that: "Subject to the provisions of this Act, the company may make and maintain in the lines or situation, and according to the levels shewn on the deposited plans and sections, the railways and other works shewn on the deposited plans,

(1) Law Rep. 18 Eq. 714.

together with all proper stations, sidings, approaches, works, and conveniences connected therewith, and may enter upon, take, and use such of the lands delineated on the said plans, and described in the deposited book of reference, as may be required for the purposes of their undertaking."

The Plaintiffs were tenants under a building agreement, and were about to build upon a piece of ground containing about seventeen acres, bounded on the north-west by the line of the *Great Eastern Railway*. This ground was at present a nursery garden. The annexed plan is a copy of so much of the deposited plans as



related to the Plaintiffs' property, except that for the sake of clearness the boundary of the garden, except where it abuts on the *Great Eastern Railway*, is denoted by a broad black line instead of a thin line, and a line is added which is mentioned below. The dotted lines (other than the limits of deviation) represent footpaths.

The only entry in the book of reference which referred to the Plaintiffs' property was the following :—

No. on Plan.	Description of Property.	Owner or reputed Owners.	Lessees or reputed Lessees.	Occupiers.
235	Nursery Garden.	[The names of the freeholders given.]	W. H. Protheroe. G. F. Morris.	W. H. Protheroe. G. F. Morris.

C. A. 1891 — PROTHEROE v. TOTTENHAM AND FOREST GATE RAILWAY CO.

The company, on the 28th of March, 1891, served the Plaintiffs with a notice, dated the 25th, to treat for a strip of land containing 3A. 2R. 6P., running through the nursery ground (numbered 235 on the plan), and bounded on the south-west by a slightly irregular line lying a little to the south-west of, and only slightly deviating from, the central line of the intended railway as delineated on the plans, and on the north-east by a line running parallel to, and at a distance of about a chain and a half to the north-east from, the north-easterly limit of deviation. This line is laid down on the annexed plan, though it did not appear on the deposited plans. On the 19th of June the company gave the Plaintiffs notice that they should apply to the Board of Trade to appoint a surveyor to determine the value of the Plaintiffs' interest in the land included in the notice to treat. On the 30th of June the Plaintiffs commenced this action, and on the 10th of July moved before Mr. Justice *Kekewich* for an injunction to the effect stated above.

Warmington, Q.C., and *Dibdin*, for the Plaintiffs, contended that the strip of land in question was not "delineated and described," within the meaning of sect. 5 of the company's special Act; and that they could not, therefore, take any part of No. 235 beyond the north-easterly limit of deviation.

[They referred to *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1); *Dowling* v. *Pontypool, Caerleon, and Newport Railway Company* (2); and *Finck* v. *London and South Western Railway Company* (3).]

Renshaw, Q.C., and *R. J. Parker*, for the Defendant company, contended that in *Wrigley's Case* and *Dowling's Case* there was nothing describing or indicating land outside the limits of deviation; whereas in the present case the plans and book of reference did indicate and describe No. 235 as including land outside the limits.

Warmington, in reply.

(1) 4 Giff. 352; 9 Jur. (N.S.) 710. (2) Law Rep. 18 Eq. 714.
(3) 44 Ch. D. 330.

KEKEWICH, J.:—

C. A.
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It seems to me that a broad distinction exists in the purport of the expressions "limits of deviation" and "book of reference" in the special Acts of railway companies. The limits of deviation turn, more than upon anything else, upon engineering and on the accommodation intended to be given by the railway company. That is to say, the tribunal which has to consider whether the Bill should become an Act or not has to determine whether a railway may, with convenience to the public, be made within certain limits; and secondly, whether it can properly be made within those limits, having regard to the engineering and other difficulties; and the limits of deviation are laid down mainly with reference to those considerations. Of course, there comes in another consideration when the question arises as to whether a particular building will have to be taken, or a particular park will be interfered with, and so on; and in framing the limits of deviation the promoter of the Bill considers very much the cost of purchase outside the cost of mere engineering; but, I repeat, the tribunal, the Committee of either House of Parliament, is bound to regard, in settling the limits of deviation, the convenience of the public and the capability of the company to construct the works within the proposed limits.

As regards the lands to be taken, the first and paramount consideration is, whether those lands are reasonably required for the purpose of constructing the line which for that purpose is assumed to be convenient to the public and capable of construction. There is no occasion to refer to the limits of deviation in the description of the land. I think one is likely to go astray if, in searching for the proper description of the land, you dwell on the limits of deviation. The description of the land will be found on the deposited plan, and you will there also find the limits of deviation, because the deposited plan fulfils both offices; but you ought not to look at the limits of deviation for the purpose of the description: they are there for a different object. If you turn to the book of reference you will not find the limits of deviation at all: it is wholly devoted to the description of lands intended to be taken. The object of describing the lands is, not only to enable the company to satisfy the Committee that

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they can make the line, but, what is more essential, to enable the landowner to give reasons why the line should not be made at all, or, at any rate, should not be made so as to interfere with his property. By that means you arrive at the real intention of the description, which is, to give full notice to the landowners.

I approach the construction of an Act of this kind from that point of view. The railway company are authorized, in common form, in sect. 5 of this Act, to make and maintain their railways and works in the lines or situation and according to the levels shewn on the deposited plans and sections, and so on. That is the power of construction which Parliament authorizes. For that purpose they are further authorized to take and use such of the lands delineated on the said plans, or described in the deposited book of reference, as may be required for the purposes of their undertaking; and it seems to me clear, on the construction of the section, and particularly when one has regard to the considerations I have mentioned, that all any one has to do, desiring to ascertain whether the railway company are acting within their powers or whether they are transgressing them, is to inquire, "Are the lands which the company is proposing to take delineated in the deposited plans and described"—using the copulative, not the disjunctive—"in the book of reference; and are they also actually required for the purposes of this Act?" There are three things. The third must not be forgotten; because I put to the counsel for the Defendants the case of a large extent of open country, extending it may be for a mile from the centre line, and which would not and could not really be described; but, even supposing it were held to be delineated on the plans and described in the book of reference, it would, nevertheless, not be within the power of the company to take all that land, because it would not be required for the purposes of their undertaking. That, I apprehend, to be elementary law as applied to the powers of railway companies. That is the question which I have to determine with reference to this particular property, No. 235.

Now, what is meant by "the lands delineated on the said plans, and described in the deposited book of reference"? If it means

anything like such a description as one would find in a conveyance—that is to say, an adequate description of the property accompanied by a plan drawn in the margin of the deed, with abuttals, and so forth—there is an end of this case. It is not pretended that there is any such description of this land; and certainly land which the company are entitled to take is not described in any such way. The description must be something less than that; and I have the authority of, not only a competent Judge, but an experienced conveyancer, for giving an interpretation to the words entirely different from that which you would apply to a conveyance. Vice-Chancellor *Hall*, in *Dowling* v. *Pontypool, Caerleon, and Newport Railway Company* (1), says the word "delineated" in a railway company's special Act must have a broader interpretation than that applied to a conveyance. He says (2), "If it be necessary to say what it does mean, I say I think it means sketched or represented, or so shewn that landowners would have notice that the land might be taken." That, to my mind, is a sufficient and an accurate guide.

Now I turn to the book of reference. I find the whole of the property 235 mentioned there as a "nursery garden." I have not heard a suggestion in the evidence or in argument that what the company desire to take is not part of a nursery garden or of 235. It is part of 235. It is, I must assume, all nursery garden, and it is the property of the Plaintiffs. So that the book of reference tells me that the company may take, if they eventually require it for the purposes of their undertaking, the whole of 235, at any rate as far as it is a nursery garden.

Then I turn to the deposited plan, and there, no doubt, the difficulty occurs. On the plan there is a distinct boundary on the west, or north-west. There the *Great Eastern Railway Company* crosses the new line and forms a distinct boundary. Then on the south-east there is a line dividing 235 from 236 and other adjoining lands. With the south-western boundary I am not concerned. On the north-east, at the top of the plan, there is no dividing line whatsoever; 235 has no boundary there, and evidently extends beyond what is precisely shewn on the plan, because the dotted lines indicate incomplete paths or intersections

(1) Law Rep. 18 Eq. 714. (2) Law Rep. 18 Eq. 740.

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of 235 extending to the north-east; and it is obvious at once that 235 extends to the north-east indefinitely, it may be for a considerable distance. Then, what is the position of the landowner who takes the book of reference and finds the whole of 235 included—that is, the whole of the nursery garden—and on turning to the deposited plan finds only a part of it included within the limits of deviation, but an indication that those who drew that plan knew that there was something outside? I cannot help thinking that the conclusion he is intended to draw, or which he must draw, is that some of this part of 235 may be taken; and if that is the right conclusion, it brings the case directly within what Vice-Chancellor *Hall* says—"sketched or represented, or so shewn that landowners would have notice that the land might be taken." He does not say, "will be taken," but "might be taken"—that is to say, might be taken if the purposes of the undertaking ultimately required it. I think the necessary conclusion of any man looking at these plans, and knowing what the land is, as a landowner must be supposed to know, would be that possibly the company would require to take this other land—that it is sketched or represented for that purpose. But then the argument for the Plaintiffs against that rests on the decision in *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1). The Plaintiffs' counsel say, turning to the plan in that case, which is printed in the report of *Dowling's Case* (2), that there really is no distinction between *Wrigley's Case* and the present; and, moreover, that *Wrigley's Case* was so explained and adopted by the Vice-Chancellor in *Dowling's Case* that the former is left to govern the case now before me. No doubt, in *Wrigley's Case* there was a dividing line stretching out to the top, or the north, of the plan, very similar to the line stretching out to the north-east in the present case; but in that case there is an entire absence of any indication that anything was to be taken beyond the limits of deviation, and I find nothing at all equivalent to the dotted lines in the present case, which, to my mind, do indicate that 235 extends beyond the upper limit of deviation. Therefore, so far I do not find myself hampered by *Wrigley's Case*. But it is said that Vice-Chancellor *Hall* in *Dowling's Case*, and

(1) 4 Giff. 352; 9 Jur. (N.S.) 710. (2) Law Rep. 18 Eq. 729.

also Lord Justice *Lindley* in *Finck* v. *London and South Western Railway Company* (1), treated the upper limit of deviation as the boundary of the close No. 71 in *Wrigley's Case* (2). In *Dowling's Case* Vice-Chancellor *Hall* says (3): "There was, therefore, a complete close to which the No. 71 might be referred, and no number applied to the remainder, which was undefined." What I understand the Vice-Chancellor to mean, and what I understand Lord Justice *Lindley* to mean, in referring to *Wrigley's Case* in that connection, is this—not that the northern limit of deviation was a proper boundary-line, but that the plan gave no other boundary-line, and that as the one boundary-line was given, and no other was given, you could not get out of the conclusion that the railway company meant the northern limit of deviation to be the boundary of the close in that particular instance. Beyond that, the remainder of the close had no number, and the Vice-Chancellor said that it was undefined; but in the present case the north-eastern limit of deviation does not act the function of a boundary—that, as I have already said, not being, in my opinion, its proper office. I have indications of an extension; and I think it is clearly stated that 235 does comprehend something beyond the limit of deviation; so that on that point also I find myself not fettered by the decision either in *Wrigley's Case* or *Dowling's Case*.

Therefore, I think there is enough in this case to answer the requirement put by Vice-Chancellor *Hall*, and, applying the general law that a railway company can take land for the purposes of their undertaking without reference to the limits of deviation provided that it is sufficiently described and delineated, I think the company are in the right here, and that the motion fails; and as, no doubt, this is the only point in the case, I must refuse it, with costs in any event.

G. I. F. C.

C. A.

The Plaintiffs appealed. The appeal was heard on the 29th of July, 1891.

(1) 44 Ch. D. 330. (2) 4 Giff. 352; 9 Jur. (N.S.) 710.
(3) Law Rep. 18 Eq. 741.

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Warmington, Q.C., and *Dibdin*, for the appeal:—

We say that the notice to treat includes land which is neither delineated on the deposited plan nor described in the book of reference, but which at all events is not delineated. In *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1), better reported in 9 Jur. (N.S.) 710, the boundaries beyond the limit of deviation of a field through which the limit of deviation passed were left undefined, and it was held that the company could not take the field or any part of it. The question whether they were entitled to take so much as lay within the limits of deviation does not appear to have been raised. The deposited plan in that case is given (2). In *Dowling* v. *Pontypool, Caerleon, and Newport Railway Company* (3), where the boundary of a plot was left undefined outside the limit of deviation, it was held that the company might take up to the limit of deviation. We acquiesce in that decision, and only claim to prevent the company from going beyond that limit. Take the test proposed by Vice-Chancellor *Hall* in that case (4). No one going on the ground with the deposited plan in his hand would in the present case suppose that the company had any intention to acquire powers to take land beyond the limit of deviation. *Finck* v. *London and South Western Railway Company* (5), which was relied on against us below, has no bearing on the present case, for the lands there were defined on the deposited plans. The object of the book and plans is to let landowners know what the company means to acquire power to take. Here the book of reference applies to the whole nursery garden; but on the plan there is no delineation of anything beyond the limit of deviation.

Renshaw, Q.C., and *R. J. Parker*, for the company:—

It cannot be necessary to delineate on the plans a detailed drawing of everything the company mean to acquire power to take. "Delineated" means sketched sufficiently to indicate the ground over which they mean their powers to extend. In *Wrigley* v. *Lancashire and Yorkshire Railway Company* the plan is blank

(1) 4 Giff. 352.
(2) Law Rep. 18 Eq. 729.
(3) Law Rep. 18 Eq. 714.
(4) Ibid. 740.
(5) 44 Ch. D. 330.

as regards plot 71 beyond the limit of deviation. Here we have paths delineated beyond the limit. This shews an intention to go beyond. The ground of the paths must be considered as delineated so far as the paths are drawn, and an intention is indicated to take ground so far as the delineation of those paths reaches—*i.e.*, up to a line parallel to the limit of deviation, and including all the parts of paths delineated. But we say further, that when the company wants only a strip of a piece of land reaching far beyond the limits of deviation, the boundary of that land need not be delineated. Suppose a company wants to take a small part of a down which reaches for miles, surely it cannot be necessary to put the whole down on the deposited plan? If "delineated" means "surrounded by boundary lines," we are out of Court; but we think that it only means drawn so far as is necessary to indicate what the company wish to have power to take.

[LINDLEY, L.J.:—Why could you not shew on the plans how much you wanted power to take?]

We cannot put artificial lines on the plans; we can only give real boundaries, or we should be met with the objection that the plan was wrong. If we had put the whole nursery ground on the plan, we should have been met with the objection that we were asking power to take land which we could not possibly want.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, and the question on the appeal is whether the company ought or ought not to be restrained from taking so much of the lands mentioned in their notice to treat as is not delineated on the plans and described in the deposited book of reference, and is not within the limits of deviation marked on the plans. The company are entitled by the *Tottenham and Forest Gate Railway Act*, 1890, s. 5, "to take and use such of the lands delineated on the plans and described in the deposited book of reference as may be required for the purposes of their undertaking." The lands delineated upon the deposited plans comprise (amongst others) certain portions of a nursery garden. The portions delineated are marked No. 235 on

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the deposited plan. The description in the book is not quarrelled with; it is "Nursery Garden," and the names of the owners and of the occupiers are carefully given; but the description in the book does not shew how much the company propose to acquire power to take. Part of that which is delineated is within the limits of deviation, and as to that there is no question. The delineation extends a little beyond the line of deviation; for the dotted lines, which I am told indicate pathways in the nursery garden, are carried a little beyond that line. The nursery garden contains about seventeen acres, and the Plaintiffs allege that what the company have given notice to take includes land not delineated upon the plan, and the only question is whether it is so delineated or is not.

Now, if we use our eyes, we find, I think, unmistakeably that the company have given notice to take more than is delineated on the plan. It is said, "No, that is not so, because delineated means sketched." We then come to the questions, what sketching is and how much is sketched. The peculiarity of this case is, that there is no indication at all upon the deposited plan of the limit of what the company want north of the line of deviation. In *Dowling* v. *Pontypool, Caerleon, and Newport Railway Company* (1) there was a plan shewing the boundary of what was wanted; but that boundary was not carried on quite so far as in strictness it ought to have been. The Vice-Chancellor held that, though the boundary was not carried far enough, yet that piece was sufficiently delineated. I am not quarrelling with his inference. Whether I should have drawn the same, I do not know. Perhaps I should; but it does not follow that because he drew the inference that the piece of land in that case was sufficiently delineated it is to be inferred that the piece of land here is sufficiently delineated. I do not think that it is delineated at all.

Mr. *Parker* put his case very ingeniously. He said that you cannot by the rules of the House put upon the plan boundaries which do not exist. Of course you cannot, because if you do you make a false plan and mislead people; but there is nothing that I know of to shew that you cannot put down how much you

(1) Law Rep. 18 Eq. 714.

want, or the outside of what you want, and mark it in some shape or other, though, of course, not as an existing boundary. The question here is a pure question of fact. Have the company delineated what they want? I say, No.

Then it is said that nobody would be misled. I differ *in toto*. I cannot help thinking that if I were to adopt the test suggested by Vice-Chancellor *Hall* (1), I should unquestionably come to the conclusion that this company wanted no more than they had drawn, and were confined within their limits of deviation. They have not delineated more. It is very true they have put in some marks which go to shew that the paths comprised within the limits of deviation are not boundaries, and do not stop; but the inference I should draw would be that they did not want anything beyond the line of deviation, for if they did they would have delineated it. A difficult question, I think, might arise if the company in their notice to treat had put a wavy line joining the extremities of the dotted lines that they had drawn on the deposited plan. I do not know how that might be. That might come within Vice-Chancellor *Hall's* case; but that is not what they have done. They have given a notice to treat to take lands which are not delineated on the plan, and that is an answer to the case. I cannot agree with the inference of fact which is drawn by the learned Judge. I am at one with him on the principles of law to be applied, but I cannot arrive at the same conclusion as to the facts.

FRY, L.J.:—

I am of the same opinion. I cannot concur with the learned Judge in the conclusion at which he arrived. We have to consider whether this land which it is now proposed to take is delineated. Now, it is very remarkable that it is extremely difficult to find out even from the learned counsel who argued the case so ably for the Defendants what they say is delineated. Is the whole seventeen acres which consists of nursery garden delineated? I cannot say that it is. I have only got the sketches of paths ending in nothing for a very small part of that land, and to say that the whole of that nursery garden is delineated

(1) Law Rep. 18 Eq. 740.

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in any sense you can put on the word "delineated" seems to me to be out of the question. It is not sketched; it is not represented; it is not shewn in such a manner as that the landowner would suppose that the whole was going to be taken.

Then, is the portion between the northern line of deviation and the northern boundary-line on the notice to treat in any way delineated? If all these paths had been continued up to the last-mentioned line and there made to end, I think it is possible that we might have come to the conclusion that the very fact that paths that did not physically end, were delineated as ending along a line, was an indication that the company intended to take up to that line. That might have been a delineation. It is not necessary to decide whether it would or would not; but they do nothing of the sort. These paths are indicated as unending, unlimited, obviously it seems to me for the purpose of reproducing the existing features of the ground, so as to enable the person who owns the land to tell where the limits of deviation are, and not for the purpose of delineating the land as land which is to be taken. I think, therefore, that the land proposed to be taken is in no sense delineated.

I cannot help thinking that Vice-Chancellor *Hall*, in *Dowling's Case* (1), put as wide an interpretation upon the word "delineated" as it could possibly bear. Whether it is not rather wider than I should put upon it is a point upon which I need express no opinion; but if I took the Vice-Chancellor's definition I should come to the conclusion that neither the whole of this land nor the part up to the northern boundary-line in the notice to treat is sketched, or represented, or so shewn that the landowner would have notice that the land would be taken. If I had gone on the land as the landowner, with the deposited plan and the book of reference, I should certainly never, so far as I can picture the state of things to myself, have come to the conclusion that the railway company intended to take this land. I think, therefore, that it is not delineated, and that the injunction must go.

Solicitors for the Plaintiffs: *Vincent & Vincent.*

Solicitors for the railway company: *F. C. Mathews & Browne.*

(1) Law Rep. 18 Eq. 740.

H. C. J.

LONDON PRINTING AND PUBLISHING ALLIANCE, LIMITED *v.* COX.

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1891
VAUGHAN WILLIAMS, J.
May 4, 5, 13.
C. A.
July 22; *Aug.* 3.

[1890 L. 2387.]

Copyright—Pictures—Infringement—License to Copy—Subsequent Assignment —25 & 26 *Vict. c.* 68, *ss.* 3, 4, 6 [*Revised Ed. Statutes, vol. xiv., pp.* 163, 164].

Held, by *Vaughan Williams*, J., on the authority of *Heap* v. *Hartley* (1) and *Reade* v. *Bentley* (2), that where the painter of a picture, after giving a license to *A.* to publish it in monochrome, assigns the entire copyright to *B.* without notice of the license, and then *A.*, without notice of the assignment, publishes in monochrome, *B.* can sue *A.* for infringement.

K. & Co., art colour printers, who were owners of a picture called "*The Bride*," and the copyright in it, entered into an agreement with the *A. Company*, the terms of which were embodied in a letter of the 19th of April, 1890, from *K. & Co.*, "For 55,000 copies of '*The Bride*' [style of reproduction described], price £13 9*s.* per 1000 copies, which price includes sole and entire copyright nett. 5000 copies not later than September, 1890; balance, 50,000, not later than November 15, 1890. Picture and frame to become your property for an extra sum of £17, we to insure and take all risks of picture during time of progress of work. Terms of payment, bills at five, six, and seven months from date of delivery of goods." On the 20th of May, 1890, *K. & Co.* registered themselves as owners of the copyright. After this the *A. Company* and *K. & Co.* commenced an action against an infringer, and *Vaughan Williams*, J., gave a judgment giving penalties to the Plaintiffs. The Defendant appealed:—

Held, by *Fry* and *Lopes*, L.JJ., that the title to the copyright passed immediately by the letter of the 19th of April, 1890; that *K. & Co.*, therefore, were not owners of the copyright at the time of the registration, and did not by registration acquire a title to sue; that the *A. Company* not being registered could not sue, and that the action must therefore be dismissed.

Held, by *Lindley*, L.J., that the negotiations ended by the letter of the 19th of April amounted to an agreement by *K. & Co.* to sell the copyright to the *A. Company*, but did not amount to an assignment of it; and that *K. & Co.* being the registered proprietors could sue as trustees for the *A. Company*, and that the action could be maintained.

THIS was an action for infringement of copyright in a picture. The Plaintiffs were the *London Printing and Publishing Alliance, Limited*, who were the printers and publishers of a

(1) 42 Ch. D. 461. (2) 3 K. & J. 271.

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weekly paper known as *Myra's Journal*, and *Walter Hugh Keep*, who carried on business as an art colour printer under the name of *W. H. Keep & Co.*

The Defendant, *Horace Cox*, was the proprietor of the newspaper known as the *Queen*.

In the *Lady's Pictorial* of the 2nd of November, 1889, there appeared a small sketch of a pastel picture by Mrs. *Earnshaw*, entitled "*On the Threshold*," but afterwards called "*The Bride*," the subject being the head and bust of a young woman in bridal costume.

On the 9th of April, 1890, Mrs. *Earnshaw* wrote a long letter to the art critic of the *Queen*, in which, after complaining that the *Queen* had never put in any notice of her career, she said: "The *Pictorial* people put a small sketch of '*On the Threshold*' in their paper among their sketches from the last *Grosvenor Pastel Exhibition*. It was printed all askew. I enclose the sketch. I do not know if that would prevent the *Queen* people liking to have it. The original picture is all but sold to *Myra's Journal* for a Christmas number. It is to be brought out full size, in the brightest manner; indeed they are going to spend a great deal of money on it as an advertisement for the paper. I only sell the colour copyright, and after it is produced in colours I have the right to dispose of the subject in any shape or form in monochrome."

The letter went on to state that the picture was to be reproduced in colours by Messrs. *Keep & Co.*, who had the picture in their possession, and had undertaken all negotiations. Inclosed in this letter were photographs of "*On the Threshold*," and one or two other pictures, and also a cutting of the sketch in the *Lady's Pictorial*.

It was the custom of the *Queen* to send out circulars to promising artists, inviting them to send sketches of their pictures for publication in the *Queen*, and stating that sketches which had been previously published in other journals were not admissible, and that no remuneration was to be paid to the artist. There was, however, no express evidence that the letter of the 9th of April, 1890, was in response to such a circular. No reply was sent to this letter.

At the date of this letter negotiations were pending between Mrs. *Earnshaw* and *Keep* for the sale of the copyright in the picture; and also between *Keep* and the *London Printing and Publishing Alliance* for the reproduction of the picture in colours for the ensuing Christmas number of *Myra's Journal*.

On the 11th of April, 1890, Mrs. *Earnshaw* wrote on a sheet of her letter paper an invoice to Messrs. *W. H. Keep & Co.* as follows:—"*Studio*, 15, *Newman Street*, April 11, 1890. Messrs. *W. H. Keep & Co.*, debtors to *M. H. Earnshaw*. For pastel picture and entire (1) copyright, '*On the Threshold*,' £52 : 10 : 0."

After some correspondence, Mr. *Beeton*, acting on behalf of the proprietors of *Myra's Journal* and the *London Printing and Publishing Alliance*, on the 18th of April gave a written order to Messrs. *Keep & Co.* to print 55,000 coloured copies of the picture at £13 9*s.* per thousand, "this price to include sole and entire copyright of the picture." On the 19th of April Messrs. *Keep & Co.* replied as follows:—

"We beg to thank you for the order placed with us to-day, which shall receive our very careful and immediate attention. As the matter is a little complicated through the fact of two or three letters containing the conditions, we beg to recapitulate them below, thus embodying in one letter all matters referring thereto. For 55,000 copies of Mrs. *M. H. Earnshaw's* '*The Bride*': size of paper 32 × 22, size of work thereon 28 × 18, reproduced in best style, equal in every respect to '*Lady Love*,' *i.e.* quality of work, quality of paper, and substance of paper same as '*Lady Love*.' Price £13 9*s.* per 1000 copies, which price includes sole and entire copyright nett. Twelve proofs to be ready by June 1—15, but we are to be allowed a little extra time if we are not satisfied with the result and wish to reprove and make alterations. 5000 copies of bulk not later than Sept., 1890; balance, 50,000, not later than November 15, 1890; but we are to be at liberty to deliver the whole of the bulk any time between Sept. 1 and Nov. 15, if desired. We to be under a penalty of £5 for every thousand copies of bulk not delivered by the above-mentioned contracted dates. Picture and frame to become your property for an extra sum of £17 (seventeen pounds), we to

(1) *i.e.* the copyright both in colours and in monochrome.

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insure and take all risks of picture during time of progress of work. Terms of payment, bills at five, six, and seven months from date of delivery of goods, such date not to be before September 1st, 1890. It is understood that Mrs. *Earnshaw* has given a few photographs of this picture to her friends, and may continue to do so; but she is not to make a market out of the same. We think the above includes all the conditions from all points of view.

"Yours faithfully, *W. H. Keep & Co.*

"*M. Beeton*, Esq.,

"*London Printing and Publishing Alliance, Limited.*

"*P.S.* To prevent misunderstanding about the proofs, we beg to inform you that we will put the lithography in hand very early in May, and you shall have the 12 copies as soon as we are satisfied with the result. We shall try and let you have them by June 15th, but if we are later you will know that it is for the sake of quality and not neglect.

"*W. H. Keep & Co.*"

On the 1st of May, 1890, Mrs. *Earnshaw* signed and gave to Messrs. *Keep & Co.* a receipt for the £52 10*s.*, the price mentioned in the invoice of the 11th of April, "which payment includes all copyright, which herewith becomes the property of Messrs. *Keep & Co.*, with sole rights of reproduction." At this date *Keep* had no notice of Mrs. *Earnshaw's* letter of the 9th of April.

It was stated, however, in the evidence of Captain *Wundt*, the art director of the *Queen*, that he had an interview with *Keep* some time in April or May, at which he informed *Keep* that he had in his possession a photograph of Mrs. *Earnshaw's* picture, and that he thought of reproducing it in black and white, and that *Keep* raised no objection.

On the 20th of May, 1890, Messrs. *Keep & Co.* were registered as the proprietors of the copyright in the picture.

On the 9th of August, 1890, the Defendant published in the *Queen* a reproduction of the picture, taken from the photograph inclosed in the letter of the 9th of April. At this date the Defendant had no notice that the monochrome copyright in the picture had been assigned to Messrs. *Keep & Co.*

After the commencement of this action the coloured repro-

duction of the picture appeared with the Christmas number of *Myra's Journal.*

The action was commenced on the 14th of October, 1890. By their statement of claim the Plaintiffs alleged that the publication of the engraving of Mrs. *Earnshaw's* picture in the *Queen* would materially diminish the demand for the Christmas number of *Myra's Journal,* and would thus cause serious damage to the Plaintiffs.

The Plaintiffs claimed (1.) an injunction restraining the Defendant, his servants and agents from infringing the Plaintiffs' said copyright design, and in particular from publishing any further copies of the *Queen* newspaper of the 9th of August, 1890, containing the said engraving; (2.) £800 damages; (3.) delivery up of all copies, electrotypes and plates of the design infringing the said copyright; (4.) a penalty of 6*d.* for every copy sold by the Defendant.

The action came on for hearing before Mr. Justice *Vaughan Williams* on the 4th of May, 1891.

Walton, Q.C., and *Grosvenor Woods,* for the Plaintiffs:—

The Plaintiffs are both interested in the copyright. The Plaintiff *Keep* is the proprietor of the copyright, subject to the terms of his agreement with the *London Printing and Publishing Alliance.* There has been a clear infringement of their rights.

Finlay, Q.C., and *Gye,* for the Defendant:—

The letter of the 9th of April operated as a license to the Defendant within sect. 3 of 25 & 26 Vict. c. 68, to publish an engraving of the picture in his newspaper, and at that time Mrs. *Earnshaw* was in a position to give the license. Such license does not require registration under the Act. At the date of the alleged infringement the Defendant had no notice that Mrs. *Earnshaw* had parted with anything more than the colour copyright. Neither of the Plaintiffs fulfil the conditions required by sect. 4 to enable them to maintain an action for infringement. *Keep* cannot sue, because at the date when he purported to register himself as proprietor he was not entitled to the copyright within the meaning of that section by reason

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of his contract with the *London Printing and Publishing Alliance*. That was a concluded bargain and a sufficient assignment within the Act. The *London Printing and Publishing Alliance* cannot sue because they are not registered as proprietors. Further, the reproduction in the *Queen* was by the consent of *Keep*.

Walton, in reply :—

The letter of the 9th of April did not amount to a license. Moreover, a license confers no property in the thing in respect of which the license is given, and the rights of a subsequent assignee are wholly unaffected thereby: *Heap* v. *Hartley* (1), and the cases there cited. *Keep* remained the proprietor of the copyright so long as the conditions of the contract were unfulfilled.

1891. May 13. VAUGHAN WILLIAMS, J. :—

This action is brought for infringement of the copyright in a picture called "*On the Threshold*," painted by Mrs. *Earnshaw*. The Plaintiffs claim an injunction and damages, delivery up of all copies, electrotypes and plates of the design infringing the Plaintiffs' copyright, and a penalty of 6*d*. for every copy sold by the Defendant.

It was suggested in the course of the argument that the Plaintiffs could not recover because the copyright was not vested in *Keep* at the time of the occurrence of the breach complained of. In my opinion, that part of the defence fails in fact. I think that at the time of the breach complained of—that is, the 9th of August, 1890—both the colour copyright and the monochrome copyright in the picture were vested in *Keep*. The object of adding the *London Printing and Publishing Alliance, Limited*, as Plaintiffs was, no doubt, to enable the Plaintiffs between them to secure damages, and so far as that object is concerned I think the Plaintiffs fail. In the course of the argument there was also an attempt to make out that this publication had been by the leave and license of *Keep*. In my opinion, that part of the Defendant's case wholly fails in fact.

(1) 42 Ch. D. 461.

The only real question in this case is, what was the effect of the license? For I hold that there was a license granted by Mrs. *Earnshaw* to the Defendant before the assignment by her of the copyright. I confess that when I first read the *Copyright Act*, I was of opinion that on the wording of sect. 3, a license might be treated as a partial assignment, in which case the Plaintiff *Keep* could only take the assignment to him subject to the previous partial or limited assignment by Mrs. *Earnshaw*. But I am satisfied by the case of *Heap* v. *Hartley* (1) that a license does not operate as an assignment at all. That was a case not of a copyright, but of a patent; but the principle is exactly the same whether it is a copyright or whether it is a patent, and in point of fact, the very point that a license is not equal to an assignment has been decided twice with reference to copyright. It seems to me to have been decided in the case of *Reade* v. *Bentley* (2), and also in the case of *Stevens* v. *Benning* (3), which is referred to in the judgment of *Reade* v. *Bentley*.

Under those circumstances, I find that the license was not equal to an assignment, and that the Plaintiff *Keep* took his assignment wholly unaffected by the antecedent license of Mrs. *Earnshaw*. Not much was said before me as to what effect notice to *Keep*, the assignee, of the existing license might have had upon his rights as assignee; but the question does not arise, because I find, as a fact, that *Keep* had no notice of the license given by Mrs. *Earnshaw* to the Defendant.

The result will be that I refuse the claim for an injunction, because I think an injunction will be unnecessary. It is idle to suppose that there is any danger of the proprietor of the *Queen* newspaper reproducing copies of a number published in August last year. The claim for damages also fails. The claim for "delivery up of all copies, electrotypes, and plates of the design infringing the said copyright," is too wide. If the Plaintiffs required to have the plates delivered up, they should have said "delivered up for destruction." If the claim is altered in the way I have suggested, probably the Defendant will not object to an order being made to that effect, as it will not affect the question of costs. The Plaintiff *Keep* is entitled to his claim for

(1) 42 Ch. D. 461. (2) 3 K. & J. 271. (3) 1 K. & J. 168.

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penalties, and there must be an inquiry as to the amount in the event of the parties not agreeing. In effect this Plaintiff has failed as to everything except his claim for the penalties, and as I think this action should never have been brought, I give him no costs of the action.

The action so far as concerns the Plaintiffs the *London Printing and Publishing Alliance*, will be dismissed, but as I do not think that any additional costs have been incurred by adding them as Plaintiffs, it will be dismissed without costs.

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The Defendant appealed. The appeal was heard on the 22nd of July, 1891.

Finlay, Q.C., and *Gye*, for the appeal:—

We raise four points. (1.) That there was no infringement, since the Defendant had a license from Mrs. *Earnshaw*, who, at the time she granted it was sole owner of the picture and copyright. (2.) That *Keep & Co.* were told of the Defendant's being about to reproduce the picture in monochrome, and did not object. (3.) That the company cannot sue because they are not on the register, and *Keep* cannot sue, because the registration of him was improper. (4.) That the penalty ought to be nominal. There is no statutory right to 6*d.* a copy; the amount of the penalty is discretionary, and a farthing per copy is enough. The Judge was of opinion that the Plaintiffs had sustained no injury, and he refused to give damages. He cannot have imagined that by giving 6*d.* a copy penalty he was condemning the Defendant to pay more than £700.

As to the license. The 25 & 26 Vict. c. 68, s. 4, provides only for registration of assignments, not of licenses, though sect. 3 expressly recognises licenses. There is, therefore, no obligation to register a license.

[FRY, L.J.:—Is not the consent mentioned in sect. 6 the consent of the person entitled to the copyright at the time of the publication complained of?]

No; because sect. 3 requires the license to be in writing, so the person to consent must mean the person who is owner of the

copyright at the time when the license is given. The cases relied on by *Vaughan Williams*, J., do not support his conclusion. *Heap* v. *Hartley* (1) related to an entirely different point. The question here is one which did not occur there, viz., whether a licensee can be sued for doing what the license authorizes him to do.

As to the second point, the evidence shews that *Keep* knew the picture was going to be reproduced in black and white, and did not object.

Keep was improperly registered; because at the time when he registered himself he was not owner, having sold the copyright to the *Alliance Company*. The letter of the 19th of April, on its true construction, is an assignment passing the property at once. *Keep*, therefore, cannot sue—he is a mere stranger. The company cannot sue because they are not on the register. The action, therefore, is not sustainable.

If the Court comes to the conclusion that judgment was rightly given against the Defendant, the penalty ought to be reduced. So heavy a penalty ought not to be given where there has been no wilful misdoing. Whether the Defendant was right or wrong, he had reasonable cause to believe that he was entitled to publish as he did.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the Plaintiffs —

We say that the letter of the 9th of April is not a license at all, but merely the commencement of a negotiation. If it is a license, it is only a license to publish a small sketch, not a full engraving. It was given without consideration, and cannot bind an assignee for value without notice. It was a mere revocable license, as no value was given for it. The evidence does not support the case of *Keep's* acquiescence. *Keep* was owner of the copyright at the time of registration. He had, it is true, entered into an executory agreement to sell it; but that did not pass the property to the company at once. When the conditions of the letter of the 19th of April, 1890, were complied with, the company became the beneficial owners; but *Keep*, who remained on the register, could sue as a trustee for them. The

(1) 42 Ch. D. 461.

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amount of penalties is not unreasonable according to the rule laid down by Vice-Chancellor *James* in *Pike* v. *Nicholas* (1).

Finlay, in reply :—

A license, on the faith of which expenses have been incurred, cannot be revoked—at all events, not without tendering the amount of those expenses: *Winter* v. *Brockwell* (2). As to *Keep's* being entitled to sue as trustee, it must be borne in mind that registration does not confer any title: it does not make a man the holder, so to say, of the legal estate; it is merely a condition precedent to the right to sue, and if the person on the register was not the owner when he registered, he cannot sue merely because he is registered.

1891. Aug. 3. LINDLEY, L.J. :—

This is an appeal against a judgment given in favour of the Plaintiffs in an action for the infringement of a copyright and for penalties. The Plaintiffs are the proprietors of *Myra's Journal*, and a Mr. *Keep*. The Defendant is Mr. *Cox*, who is the publisher of the *Queen* newspaper.

The question turns upon the correspondence, and the short history of the case is this. A Mrs. *Earnshaw* drew, or painted, a picture, about which, on the 9th of April, 1890, she wrote a letter to Mr. *Jackson*, the art critic of the *Queen*, and there was also a correspondence about the picture between *Myra's Journal* and Mr. *Keep*, who was negotiating with Mrs. *Earnshaw* for the purchase of the copyright. In August, 1890, the *Queen* newspaper published a print of this picture, and that is the publication that is complained of.

The first question which arises is whether the Defendant had a license to publish this print; and I do not think that he had. Mrs. *Earnshaw's* letter to Mr. *Jackson* of the 9th of April, 1890, was not, in my opinion, a license to publish the print which the *Queen* did publish in August, without any further consent from her. I do not propose to read the letter at any length, though it was much commented upon in argument. The letter itself, in my opinion, is not distinct enough to amount to a license. It

(1) Law Rep. 5 Ch. 251, 260. (2) 8 East, 308.

refers to her right to dispose of the subject in monochrome after it is produced in colours, and not before. I regard that letter as the commencement of a negotiation, not a distinct license, still less as a concluded agreement. That disposes of the first question.

I next come to the question arising on the registration. I am not myself convinced that Mr. *Keep* acquired the copyright before the 1st of May, 1890. I doubt whether the invoice of the 11th of April was an assignment of the copyright to him or was intended so to be; but this point was not, I think, argued at the Bar, and I do not base my judgment upon it. I will assume that Mr. *Keep* had the copyright vested in him when he wrote the letter of the 19th of April.

I now come to that letter, which is the most important letter in the whole correspondence. The position of things was this. *Keep* was a man who printed pictures for various journals, and, amongst others, for *Myra's Journal*. He had bought this picture from Mrs. *Earnshaw* at that date, and the letter concludes and brings to an end a correspondence between him and the proprietors of *Myra's Journal*, to which I will not refer because it is accurately summed up in this letter. [His Lordship here read the letter of the 19th of April.] The importance of that letter arises from these considerations. It is contended that this letter amounted to an assignment of the copyright by Mr. *Keep* to *Myra's Journal*. If it did, then the proprietors of *Myra's Journal* were, from the 19th of April, the proprietors of the copyright; but the proprietors of *Myra's Journal* are not registered, and they cannot therefore maintain the action. If, on the other hand, that letter did not amount to an assignment of the copyright, then the copyright would remain with Mr. *Keep*, as a trustee for the proprietors of *Myra's Journal*, and, Mr. *Keep* being registered, the action may be sustained so far as that point of form is concerned.

Now, upon this letter, which becomes, as I say, the most important letter in the whole case, my own view is this—that the negotiation between *Myra's Journal* and Mr. *Keep*, which began on the 29th of March and ended on the 19th of April, amounted to an agreement by Mr. *Keep* to sell the copyright to *Myra's Journal*, but did not amount to an assignment of it by him, even

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if he had himself then acquired it. Even if the letter of the 19th of April ever did pass the copyright, I cannot think that the copyright passed before the order for printing was completed, and the bills for the last batch of prints were given. The picture itself, I think, did pass; but the price of that did not include the copyright, which is dealt with as incidental, not to the picture, but to the coloured prints which were to be delivered. In my opinion, therefore, Mr. *Keep* was trustee of the copyright for the proprietors of *Myra's Journal* at the time when the Defendants printed "*The Bride*." It follows, therefore, that in my opinion the action may be maintained by Mr. *Keep* as the registered proprietor of the copyright. I do not think that the action by the co-Plaintiffs ought to have been dismissed; but as this was done without costs nothing turns upon it.

It follows, therefore, that the only question is whether the penalty of 6*d.* per copy ought to be reduced. The learned Judge who tried the case declined to grant an injunction, because he was satisfied that the Defendants were not likely to reproduce this print. He also declined to give any damages, because he said that the Plaintiffs had not sustained any, but under the Act he considered that the Plaintiffs were entitled to penalties, and he gave them 6*d.* a copy. Now, 6*d.* a copy comes to a very large sum, and to a much larger sum than the learned Judge can have contemplated. His remarks convince me that he had not the least intention of inflicting a penalty of between £700 and £800 upon the Defendant, and I have his authority for saying that he did not contemplate anything of the kind. A penalty of a farthing a copy will amount to more than a nominal sum, and will be ample.

In my judgment, therefore, the appeal ought to be allowed to this extent, that the penalty ought to be reduced to a farthing a copy.

My Brothers, however, take a different view, as will be stated by my Brother *Fry*.

FRY, L.J.:—

With regard to the construction of the letter of the 9th of April, 1890, which it has been contended is a license, I take

exactly the same view as has been expressed by the Lord Justice. I think it was an offer of negotiation and not a license, and I think it is impossible for the Defendant successfully to rely upon that. In my judgment the difficulty in the way of the Plaintiffs arises upon the registration of the copyright.

I have no doubt whatever that a trustee in whom a copyright is vested may be registered as the owner, and may sue in that character; but it is impossible for one person to be the owner and another person be on the register, and for those two persons successfully to sue. The question, therefore, in this case turns upon the true construction to be given to the letter of the 19th of April.

Now, I start with this consideration, that in my view the document of the 11th of April, 1890, had vested the copyright in Messrs. *Keep*, and, as I understood, counsel on both sides took that view, and therefore the point was not argued—in fact, I think it was expressly admitted by counsel on both sides that that was the view of all parties to the transaction. Of course, that does not bind us in any way with regard to the legal operation of the instrument; but in my view that is the correct operation of that instrument. It does not appear to me to have been intended that any further assignment in writing should be executed. Therefore, I start with the view that Messrs. *Keep* were the owners of the copyright when they wrote the letter of the 19th of April, 1890, which summed up the result of previous correspondence and negotiation.

The question is whether the copyright passed at once on the sending of that letter. The contract contained in that letter dealt with three things. It dealt with the picture itself; it dealt with the copyright in the picture, and it dealt with the lithographic copies which were to be produced by Messrs. *Keep*. The picture passed at once. I think there can be no doubt about that. The intention of both parties was that the picture should pass at once, and that view is confirmed by the fact that there is an express stipulation with regard to the risk of the picture and the insurance of the picture being assumed by Messrs. *Keep*. Of course, if it had not passed it would still have been at their risk, and it would have been their duty to keep it

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until the time came for delivering it over. Therefore, that stipulation appears to me to be strong to shew what I think the rest of the contract would also imply, namely, that the picture passed on the execution of the instrument. The copies, of course, would pass on delivery, and not until delivery. They were not in existence at the date of the contract. When, then, did the copyright pass? In my opinion, it passed with the picture.

Now I arrive at that conclusion for these reasons. In the first place it is to be observed that nothing remained to be done with the copyright. There was no condition precedent to its passing. It was not like goods which you have to sort or to weigh, or to measure, and where the doing of those acts constitutes a condition precedent to the passing of the property. There was nothing whatever more to be done with the copyright.

Then, again, it is to be observed that the very order which is given by *Beeton's* letter of the 18th of April to Messrs. *Keep* to print the copies seems to me to have been an exercise of the right vested in the Plaintiffs, the printing company. They, as owners of the copyright, as it appears to me, ordered the production of the copies of the picture.

But, again, it seems to me extremely improbable that the picture should pass and the copyright remain in the vendor. That is a possible but an unnatural dissociation of two kinds of property, which I think we ought not to infer and ought not to think probable. Again, it seems to me that it is very improbable that the copyright should be allowed to remain in Messrs. *Keep* during the remainder of the year. The copies were not to be delivered until towards the end of the year. Now, if the copyright remained in Messrs. *Keep*, I suppose they could use it; but if they were trustees of it absolutely for the *Alliance Company*, the natural thing is that they should pass it to them. There is no reason for the trusteeship. If the copyright were to be held in suspense so that neither party could use it at all during the year, a very curious result would arise on the contract; whereas if it passed at once it would be in the power of the *Alliance Company* to use it in such manner as they might think fit. That seems to me from a business point of view the more probable intention of both parties. If it were other-

wise, matters would be in this position, that the copyright could not be used by the *Alliance Company* because it was not theirs, and could not be used by Messrs. *Keep*, because they could not derogate from the value of the property. If it did not pass at once, when did it pass? That is a question which I ventured to press counsel with; but it seems to me that no clear answer could be given. Did it pass on the delivery of the proofs, or did it pass on delivery of the first instalment of copies, or with the giving of the bills or with the payment of the bills? I confess I can find no clear reason why it should pass on the performance of any one or other of those things. It was a contract for sale on credit. Nothing was required to be done. The contract was in writing, and, according to my view, the copyright passed at once to the Plaintiffs. Then, if that were so, the company ought to have been on the register, and not Messrs. *Keep*. It seems to me, therefore, that we have a condition of things in which the one person is the owner of the copyright, and the other person is on the register. Therefore, the Plaintiffs are disentitled to sue; and the consequence is that this appeal ought to succeed, and that the action ought to be dismissed.

If the action could be maintained, I entirely agree with the view taken by my learned brother as to the reduction of the penalty; but inasmuch as Lord Justice *Lopes* takes the same view as I have expressed, and substantially, I think I may say, for the same reasons, the result will be that the appeal must succeed, and the action be dismissed with costs.

Solicitors: *Goldberg & Langdon; Powell & Goodale.*

H. C. J.

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1890
CHITTY, J.
Nov. 18, 19, 20, 25.
1891
Jan. 14.
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March 19, 20, 21, 23; *July* 8, 14.

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[1889 D. 1593.]

Will—Settled Estate—Tenant for Life—Equitable Estate—Waste—Timber—Crops—Periodical Cuttings—Proceeds of Sale—"Profits of Estate"—Capital or Income—"Timber Estate"—"Seasonable Wood"—"Silva Cædua"—"Coppice"—Custom—Local Usage—Evidence—Repair, Direction to keep in—Ornamental Lake, Fouling of—Negligence—Action by next Tenant for Life and Remainderman—Liability of Estate of late Tenant for Life—Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 7 [*Revised Ed. Statutes, vol. i., p.* 706].

A testator devised his freehold estate of *W.*, in *Buckinghamshire*, to trustees for 100 years, if his widow and two other persons, or any of them, should so long live, "upon trust," out of the rents and profits, to pay a jointure to his widow, the interest on mortgages on the estate, and certain annuities; and to pay the surplus rents and profits to his widow during her life for her separate use without power of anticipation, and permit her to reside in and have the use of the mansion-house and grounds; and, subject to the term, he devised the estate "to the use of" certain persons successively for life with successive remainders to their issue in strict settlement, with a proviso that the several limitations thereinbefore contained "to the use of any person or persons for life" should be "without impeachment of waste." And the testator declared that his widow, and every other person who, during the said term, should become for the time being entitled to the actual possession or to the surplus rents and profits of the estate, should keep the mansion-house, grounds, fences, gates, and appurtenances in good repair; and that it should be lawful for her or them, with the consent of the trustees, to fell timber (not being ornamental timber) necessary for such repair.

On the testator's death, his widow, as equitable tenant for life, entered into possession of the estate, and continued in possession until her death, she surviving the two other *cestuis que vie* named in the will. Upon the estate were extensive woods, consisting principally of beech trees (which, according to the custom of *Buckinghamshire*, were "timber"), besides other timber, such as oak, ash, and elm; and during her lifetime she cut and sold large quantities of the timber, received the proceeds, and applied them to her own use, her annual income from this source being considerable.

Immediately upon the widow's death, the next tenant for life and remainderman under the uses of the will brought an action against her executors seeking to make her estate liable, on the ground of "waste," for the timber so cut, and also for her neglect in having allowed an ornamental lake near the mansion-house to get into a foul condition. It was proved that the mode of cutting by the widow was in accordance with local usage and with the practice of the testator and his predecessors.

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Held, by *Chitty*, J., (1.) that the widow had not committed waste in cutting the timber, and (2.) that she had incurred no obligation, either express or implied, under the will to cleanse the lake.

Upon appeal (before *Lindley*, *Bowen*, and *Kay*, L.JJ.)—the appeal relating to the first point only—the decision of *Chitty*, J., was affirmed, *Kay*, L.J., *dissentiente*:

Per Lindley and *Bowen*, L.JJ.: Evidence of modern usage as to a particular mode of cultivation of property is just as admissible in construing a devise as in construing a grant or lease.

Per Kay, L.J.: There is no exception from the common law as to waste in favour of the limited owner of a "timber estate." A custom sufficient to control the common law as to waste in cutting down timber must be nothing less than an immemorial custom for a limited owner to commit such waste; mere modern usage or practice to that effect is insufficient.

The doctrine of "waste," as applicable to the cutting of timber by a tenant for life of a freehold estate, discussed.

The meaning of "timber estate," "timber," "seasonable wood," "*silva cædua*," and "coppice," discussed.

The exception in *Honywood* v. *Honywood* (1), in favour of owners of timber estates, considered.

APPEAL from Mr. Justice *Chitty*.

In 1848 Sir *George Henry Dashwood*, Bart., became, on the death of his predecessor, Sir *John Dashwood King*, seised in fee of a landed estate about 5000 acres in extent, with the mansion-house thereon, known as the *West Wycombe* estate, situate in the counties of *Buckingham* and *Oxford*, a small part only of the estate being in the latter county. By his will, dated the 29th of May, 1855, Sir *G. H. Dashwood* devised the estate—described in the will as "in the county of *Bucks*"—and all other his freehold and copyhold estates (subject to certain mortgages) to trustees for the term of 100 years from his decease, if his wife, Lady *Elizabeth Dashwood*, and his brother, the Rev. *John Richard Dashwood*, and his sister *Mary*, the wife of the Honourable *Augustus Fitzhardinge Berkeley*, or any of them, should so long live, upon trust, out of the rents and profits thereof to pay, in the first place, a jointure of £600 a year to Lady *Dashwood*, and the interest on the mortgages, and in the next place to pay certain annuities; "and, subject to the trusts aforesaid, upon trust to pay the surplus or residue of the yearly rents and profits of my said real estate unto my said wife during her life for her

(1) Law Rep. 18 Eq. 309, 310.

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separate use, independent of the control or engagements of any husband she may hereafter marry, and without power during any future coverture to alien, charge, or otherwise anticipate the future payments of the same, but her receipts alone, notwithstanding any such coverture, and no other, shall be sufficient discharges to my said trustees or trustee for the same; and upon trust to permit my said wife, and other the person for the time being entitled to the actual possession or to the receipt of the rents and profits, or the surplus rents and profits, of my said estates, to reside at and have the use and enjoyment of my mansion-house, lands, and grounds usually in hand at *West Wycombe* aforesaid, with the appurtenances, and of the effects hereinafter directed to be held as or in the nature of heirlooms, free from rent." And from and after the determination of the said term, and in the meantime subject thereto and to the trusts thereof, the testator devised his said estates to certain uses in favour of his children and their issue, with remainder to the use of his nephew, *Edwin Hare Dashwood*, for life, with remainder to the use of the Plaintiff *Edwin Abercromby Dashwood*, the first son of the said *E. H. Dashwood*, for life, with remainder to the use of the first and other sons of the Plaintiff *Edwin Abercromby Dashwood* successively in tail male, with remainder to the use of the second and other sons of the said *Edwin Hare Dashwood* successively in tail male, with divers remainders over, and an ultimate remainder to the use of the testator's right heirs for ever. And the will contained a proviso "that the several limitations hereinbefore contained to the use of any person or persons for life shall, so far as concerns my freehold hereditaments, be without impeachment of waste." And the testator directed and declared "that my said wife and every other person who during the said term of 100 years (determinable as aforesaid) hereinbefore limited to my said trustees shall become for the time being entitled to the actual possession or to the receipt of the rents and profits, or the surplus rents and profits, of my said estates, shall from time to time keep my said mansion-house at *West Wycombe*, and the outbuildings, parks, grounds, fences, gates, and appurtenances thereto belonging, in good and substantial repair, order, and condition; and that it shall be lawful for her and them, with

the consent of my said trustees or trustee for the time being, from time to time to fell such timber (not being ornamental timber) on any part of my estates as shall be necessary for the purposes of such repair, or of the repair of any other houses, buildings, fences, gates, and appurtenances, on any other parts of my said estates hereinbefore devised." And the testator declared that his trustees should not be concerned to see to the state of repair and condition of the said several premises or be in any manner responsible to any person for any default or neglect by his said wife, or other person or persons as aforesaid, to keep the same premises respectively, or any of them, in good repair, order, and condition. And the testator bequeathed his residuary personal estate to his said wife.

The testator died on the 4th of March, 1862, leaving his widow, Lady *Elizabeth Dashwood*, surviving him. On her husband's death Lady *Dashwood*, as equitable tenant for life under his will, entered into possession of the *West Wycombe* estate, including the mansion-house and grounds, and continued in possession until her death, which took place on the 24th of May, 1889. The said *John Richard Dashwood* and *Mary*, the wife of the Hon. *Augustus Fitzhardinge Berkeley*, the two other *cestuis que vie* named in the will, predeceased Lady *Dashwood*. The testator had no issue, and, upon the death of Lady *Dashwood*, the Plaintiff, Sir *Edwin Abercromby Dashwood*, Bart. (his father, *Edwin Hare Dashwood*, having died in 1882), became tenant for life under the will. At present he had no son, and under the limitations of the will, his younger brother, the co-Plaintiff, *Francis Dashwood* (the fourth son of *Edwin Hare Dashwood*), who was born on the 18th of August, 1863, that is, after the testator's death, became at his birth, and now was, the tenant in tail in remainder.

Soon after Lady *Dashwood's* death this action was brought by Sir *Edwin Abercromby Dashwood* and *Francis Dashwood*, as the present tenant for life and remainderman under the will, against the executors and legal personal representatives of Lady *Dashwood*, and against the present trustees of the will, and the legal personal representatives of the former trustees who had died. The Plaintiffs alleged in their statement of claim, that upon the lands devised by the testator there were, at the time of his death, standing

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and growing a large number of timber and timber-like trees (including beech trees, which, by the custom of *Buckinghamshire*, were accounted timber), and other trees and saplings and a large quantity of underwood; that Lady *Dashwood* during her tenancy for life caused to be felled and cut large quantities of the said timber trees and other trees, and also of the said saplings and underwood, and sold the same and applied the proceeds thereof, without distinction, to her own use; and that, although, a portion of the said underwood had been properly cut in due course of husbandry, and, as to some of the timber and other trees, their having been cut had been beneficial to the growth of the remainder, and certain parts thereof had been properly applied in repairs on the devised lands, yet by far the greater number and quantity of such trees and underwood had been improperly cut, and their severance from the soil constituted an act of waste for which Lady *Dashwood* became and her representatives now were responsible, and which, the Plaintiffs submitted, should be made good out of her estate.

The Plaintiffs further submitted that, having regard to the provisions of the will, Lady *Dashwood*, on entering into possession, incurred the obligation or duty of putting and keeping the mansion-house, outbuildings, park, grounds, fences, &c., in good and substantial repair, order, and condition; but, as the Plaintiffs alleged, she neglected her said duties and obligations, so that at the date of her death the mansion-house, outbuildings, and other premises were out of repair, and in bad order and condition. Amongst other alleged neglects, she had suffered the lake and ornamental waters in the park (part thereof being in front of the mansion-house), and the stream running through them, to become foul and choked with weeds, mud, and filth, to the prejudice of the health of the occupiers of the house, and otherwise to the detriment of the Plaintiffs or other the reversioners of the estate. The Plaintiffs further alleged that a large sum of money would be required to restore the said premises to a state of good and substantial repair, order, and condition, and that cleaning the lake and ornamental waters, and putting them into good order and condition, would alone cost a considerable sum; and they submitted that the requisite sums of money

should be made good, raised, and paid to the Plaintiff, Sir *Edwin A. Dashwood*, out of Lady *Dashwood's* estate.

The Plaintiffs accordingly claimed, amongst other relief: (1.) An inquiry whether any and what timber and other trees formerly standing and growing on the *West Wycombe* estate, or other the freehold or copyhold lands devised by the will of Sir *G. H. Dashwood*, were, in the lifetime of Lady *Dashwood*, his widow, cut down by her or by the late or present trustees of the will, and what was the value thereof respectively; and whether any and what part thereof was ornamental timber, and whether any and what part thereof had been properly cut for the benefit of the said estate and lands or for repairs; and in what manner the timber and other trees so cut down had been applied, sold, or disposed of; and an inquiry whether any and what underwood and trees not timber, and timber trees under twenty years' growth, had been improperly cut by any of the persons aforesaid during the period aforesaid, and in what manner the same had been sold and disposed of; (2.) A declaration that the cutting of all such timber and other trees and underwood so cut as aforesaid (except such as had been properly cut for the benefit of the estate or for repairs) was an act of waste for which Lady *Dashwood*, the late equitable tenant for life, and the trustees for the time being of the testator's will respectively, were, in their respective lifetimes, and their several estates now were, jointly and severally accountable in Equity, and that such timber had belonged, and that the proceeds of sale thereof now belonged, to the Plaintiff *Francis Dashwood*, so far as the said timber had been cut since the 18th of August, 1863 (the date of his birth); or, in the alternative, that such timber had belonged, and that the proceeds of sale thereof now belonged, to the Plaintiff, Sir *E. A. Dashwood*; (3.) A declaration that the proceeds of sale of such of the said timber which had been so sold as aforesaid as had been properly cut for the benefit of the said lands since the death of the testator now belonged to the Plaintiff, Sir *E. A. Dashwood*; (4.) A declaration that the proceeds of sale of such of the said underwood and trees not timber, and of timber trees under twenty years' growth, as had been improperly cut, belonged to the Plaintiff, *Francis Dashwood*, and the other persons entitled in succession

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under the limitations in the will, and ought to be accounted for by the legal personal representatives of the late equitable tenant for life, Lady *Dashwood*, and by the said trustees or their representatives in manner aforesaid, and the amount and value thereof invested for the benefit of the persons so entitled as aforesaid; (5.) An account of the proceeds of sale of all such timber and other trees and underwood as aforesaid sold by the said late equitable tenant for life or trustees, or any or either of them, between the deaths of the testator and such tenant for life, distinguishing how much thereof had arisen from timber properly cut, and how much from timber wrongfully cut; (6.) That the Defendants, Lady *Dashwood's* legal personal representatives, and the Defendants, the legal personal representatives of the late trustees of the will of Sir *G. H. Dashwood*, and the Defendants, the present trustees of the will, or some or one of them, might be directed to make good the amounts of the said proceeds of sale, with interest, according to their respective liabilities in reference to the matters aforesaid, and the declarations which might be made in that behalf, the said personal representatives making good the said several amounts respectively out of the estates and assets of their several testators so far as the same would extend, and that, if necessary, such estates, or some or one of them, might be administered for the benefit of the Plaintiffs and the other creditors, if any, upon such estates or estate respectively; (7.) That the portion of the money so as aforesaid due to each of the Plaintiffs respectively might be ascertained and paid to him, or otherwise might be paid, applied, and disposed of, for the benefit of the persons entitled in succession under the limitations contained in the will of Sir *G. H. Dashwood*, as the Court might think fit to direct; (9.) A declaration that, under and by virtue of the directions contained in the will of the testator, it was incumbent upon Lady *Dashwood*, the late equitable tenant for life, on entering into possession of the testator's estates, to put, and thereafter at all times during her tenancy to keep, the mansion-house and the outbuildings, park, grounds, fences, &c., including the lake and ornamental waters, in good and substantial repair, order, and condition; (10.) An inquiry as to the present state of repair, order, and condition of the mansion-house and premises, includ-

ing the lake and ornamental waters; and, if it should appear that the same were not now in good substantial repair, order, and condition, an inquiry as to the sum which would be necessary to restore the premises to such good and substantial repair, order, and condition; and (11.) That in the event last aforesaid the Defendants, Lady *Dashwood's* legal personal representatives, might be ordered to pay the amount which should be found necessary for such repairs and restoration, including the expense of cleaning and amending the condition of the lake and ornamental waters, to the Plaintiff, Sir *E. A. Dashwood.*

The Defendants, Lady *Dashwood's* legal personal representatives, in their statement of defence, did not admit that by the custom of *Buckinghamshire* beech trees were accounted timber; and they alleged that by the custom of that part of *Bucks* where the devised lands were situated (and alternatively by the custom of the estate whereof so much of the said lands as consisted of beech woods formed part), beech woods might be periodically felled, cut, and sold by the person for the time being entitled to the profits of the estate, in a due course of cultivation, and that such felling, cutting, and selling was not waste. They further alleged that, by the custom of the counties, manors, and hundreds in which the said lands were situate, timber, timber-like trees, beech trees, and other trees, saplings, and underwood (not being ornamental timber) growing on such lands might be lawfully felled, cut, and afterwards sold by the person for the time being entitled to the possession of such lands, or to the rents and profits thereof, and that the proceeds of sale might be dealt with as part of the annual fruits of the land, and be paid to or received by such person for his or her own absolute use and benefit.

They also alleged that, throughout a period of many years before his death, the testator, and those through whom he derived title, had used, enjoyed, and managed the said lands by cultivating the same for the produce of saleable timber, and had periodically felled, cut, and afterwards sold timber, timber-like trees, beech trees, and other trees, saplings, and underwood thereon, and had dealt with the proceeds of sale as part of the annual fruits of the land; and that the said lands had, at the time of the testator's death, become and were by him in fact

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accounted as a "timber estate," and accordingly were devised by him to be used, enjoyed, and managed after his death by the several persons (including Lady *Dashwood*) for the time being entitled to the possession or the rents and profits thereof in the same manner as such lands had been theretofore used, enjoyed, and managed as aforesaid. They, therefore, insisted that Lady *Dashwood* was entitled, during the continuance of her interest, to fell, cut, and afterwards sell timber, timber-like trees, beech trees, and other trees, saplings, and underwood, and to apply the proceeds for her own absolute use and benefit; and that under the provisions of the will she was entitled to fell and cut all such timber (not being ornamental timber) as might be required for repairs. The Defendants did not admit that Lady *Dashwood* had in fact caused to be felled or cut any timber, timber-like trees, beech trees, or other trees, saplings, or underwood, or had been guilty of any act of waste; and they asserted, that if there had been any fellings or cuttings by her they were proper and in exercise of her said right under the will of felling and cutting for repairs, and were duly applied for that purpose, or, with the knowledge and acquiescence both of the trustees for the time being, and of *Edwin Hare Dashwood*, and of the Plaintiff, Sir *E. A. Dashwood*, were sold and the proceeds thereof received by her as part of the annual profits of the said lands. The Defendants further did not admit that Lady *Dashwood* was under any obligation to repair or keep in good repair and condition the mansion-house, &c., or the lake or ornamental waters, as alleged by the Plaintiffs, or that the same were in fact at present out of repair or in bad condition, or that any sum of money would be required to restore them to good repair and condition; and they concluded by relying on the various *Statutes of Limitations*, particularly the statute 21 Jac. 1, c. 16, and the *Real Property Limitation Act*, 1874, and on the acquiescence above mentioned, as a bar to the action.

The Defendants, the present trustees of Sir *G. H. Dashwood's* will, delivered a statement of defence to the same effect, denying that any quantity of trees had been improperly cut by Lady *Dashwood*, or that either she or her representatives was or were in any way responsible for the cutting. They also relied upon

the *Statutes of Limitations* and acquiescence, and submitted that the trustees of the will were bound to let Lady *Dashwood* into possession of the estates, and were not liable for her wrongful acts (if any) while in possession.

In their reply, the Plaintiffs joined issue on the several defences, and stated that they were, respectively, infants until the 28th of October, 1875, and the 18th of August, 1884; that the Plaintiff, Sir *E. A. Dashwood*, was, at and before his coming of age, and continuously down to the time of the institution of the action in 1889, resident beyond seas, and that he and his co-Plaintiff were entirely ignorant of what had taken place in respect of the estate until after the death of Lady *Dashwood*.

The action was tried before Mr. Justice *Chitty* on the 18th, 19th, 20th, and 25th of November, 1890, the Plaintiff's case being pressed only against the executors of Lady *Dashwood*. Before the trial the parties came to an arrangement as to the sum payable for dilapidations; and in the course of the argument the point as to the Plaintiffs' right of action being barred by the *Statutes of Limitation* was given up by the Defendants' counsel, so that the sole questions remaining for decision were, briefly, first, whether, and, if so, to what extent, the principal Defendants, the legal personal representatives of Lady *Dashwood*, were responsible for the timber cutting on the *West Wycombe* estate during the period of her life tenancy; and, secondly, whether they were liable for her neglect in allowing the lake and ornamental waters to get into a foul condition. A large number of witnesses, including several surveyors and estate agents, were called on both sides. With regard to the timber cutting complained of, it appeared from the evidence that, although a good deal of oak, ash, and elm had been cut by Lady *Dashwood* for various purposes, by far the greater portion of the timber cut and sold by her consisted of beech trees, there being extensive beech woods on the *West Wycombe* estate; and, consequently, the evidence and arguments were principally directed to the question of the cutting of beechwood, although the pleadings extended to the cutting of timber generally on the estate. It also appeared from the evidence that there had been for many years a large and increasing market for beechwood in the town of *High Wycombe*, the principal centre in

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England of the chair-making industry—an industry which had, in fact, sprung up in consequence of the large quantities of beech on various estates in the neighbourhood, including the *West Wycombe* estate.

In the course of the examination in chief, on behalf of the Defendants, Lady *Dashwood's* executors, of a solicitor who was agent or manager of certain estates in *Buckinghamshire* and *Oxfordshire*, he was asked several questions with a view to proving that a custom prevailed on all the estates in those counties, on which there were large beech woods, for the owner for the time being in possession of such woods to cultivate and deal with them in the same way as ordinary crops. This line of examination was, however, objected to by the counsel for the Plaintiffs as raising questions not raised by the pleadings. Ultimately, after some discussion, his Lordship granted the several Defendants leave to amend their statements of defence by inserting the following allegation: "In the county of *Buckingham*, and *separatim* in that part of the county where the *West Wycombe* estate is, and *separatim* in regard to the *West Wycombe* estate itself, there is a custom that all timber and timber-like trees in beech woods are seasonable wood, and may be cut in due course of management and at seasonable periods, and such cutting is not waste. The cutting complained of in this action by Lady *Dashwood* was in due course of management and at seasonable periods, and in accordance with the custom aforesaid."

That amendment having been allowed, the examination of the witness as to whether a custom existed in *Buckinghamshire* and *Oxfordshire* with reference to the cultivation of beech woods was proceeded with. His evidence was to the effect that, by the custom of *Buckinghamshire*, beech was timber, as had, in fact, been decided in *Aubrey* v. *Fisher* (1), though in *Oxfordshire* there was no custom making beech "timber"; that in *Buckinghamshire* it was the custom or practice to cut beechwood in rotation once in every eight to twelve years, and to treat the wood so cut as in the nature of a crop, the proceeds going to the owner for the time being of the estate, whether an owner in fee simple or

(1) 10 East, 446.

a limited owner, and being spent by him as rents and profits—that is, as part of the income of the estate. Other witnesses were called who gave evidence to the same effect.

The general nature of the rest of the evidence on both sides sufficiently appears from the judgments of Mr. Justice *Chitty* and of the Court of Appeal.

It was stated at the Bar that the proceeds of timber received by Lady *Dashwood* (exclusive of the value of timber cut for repairs) during her life tenancy averaged a net income of about £1700 a year, the total amount claimed by the Plaintiffs in the action as due from her estate in respect of such proceeds being no less than £54,873; and that a further sum of between £1800 and £2000 was claimed as the cost of cleaning the lake and ornamental waters and restoring them to a proper condition.

Sir *H. Davey*, Q.C., *Latham*, Q.C., *H. Fellows*, and *P. H. Lawrence*, for the Plaintiffs:—

Beech trees being timber by the custom of *Bucks*—*Aubrey* v. *Fisher* (1)—to cut them otherwise than for repairs is waste. Even had the cutting been sanctioned by the Court, still the proceeds should have been invested for the benefit of the first tenant for life without impeachment of waste: *Gent* v. *Harrison* (2); *Bagot* v. *Bagot* (3); *Lowndes* v. *Norton* (4). The Defendants, in calling this a "timber estate," no doubt rely on *Honywood* v. *Honywood* (5); but, even if it has been the custom to make annual cuttings of this timber in the due course of husbandry, there is no authority to shew that the tenant for life impeachable for waste is entitled to anything more than the income of the fund produced by such cuttings.

[They also referred to *Craig* on Trees and Woods (6) and *Burges* v. *Lamb* (7).]

Then as to the ornamental lake. By the terms of the will the tenant for life was bound to keep the estate in repair: the lake has been allowed to silt up and become foul, and the executors of the tenant for life are, therefore, liable to make this damage

(1) 10 East, 446.
(2) Joh. 517.
(3) 32 Beav. 509.
(4) 6 Ch. D. 139.
(5) Law Rep. 18 Eq. 306.
(6) Page 132.
(7) 16 Ves. 174, 178.

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good: *Woodhouse* v. *Walker* (1); *Gregg* v. *Coates* (2); *Batthyany* v. *Walford* (3).

Rigby, Q.C., *Byrne*, Q.C., and *T. Ribton*, for the Defendants, Lady *Dashwood's* executors:—

By custom, it is not waste to fell beechwood, even though beech trees may be technically timber by the custom of the county; but whether that be so or not, then, apart from custom, "timber estates," such as this, form an exception to the usual rule as to waste, and the proceeds of the timber belong to the tenant for life, whether impeachable for waste or not. By the terms of the will, Lady *Dashwood* was to take the "rents and profits" of the testator's estate; the beech woods were periodically cut by the testator and the proceeds enjoyed by him as part of the profits of the estate; and Lady *Dashwood* has merely continued, as she was entitled to do, the same course of dealing with these woods. It may fairly be inferred from the terms of the will that the testator intended his wife to be in the same position as the other tenants for life who took legal limitations: *Bouch* v. *Sproule* (4); *Campbell* v. *Wardlaw* (5).

As to custom, there may be a custom to cut not merely underwood, but timber trees also as "seasonable wood" or *silva cædua*: *Cruise* Dig. (6).

[CHITTY, J., referred to Lord *Fitzhardinge* v. *Pritchett* (7), on the terms "saleable underwoods," under 43 Eliz. c. 2.]

From these authorities sprang the modern doctrine of "timber estates," particularly referred to by *Jessel*, M.R., in *Honywood* v. *Honywood* (8), on which we rely.

[They also referred to *Ferrand* v. *Wilson* (9); *Bateman* v. *Hotchkin* (10); *Bagot* v. *Bagot* (11); *Pidgeley* v. *Rawling* (12); *Earl Cowley* v. *Wellesley* (13).]

(1) 5 Q. B. D. 404.
(2) 23 Beav. 33.
(3) 36 Ch. D. 269.
(4) 12 App. Cas. 385.
(5) 8 App. Cas. 641.
(6) Vol. i. tit. 5, s. 5; 22 Vin. Abr. pl. 7, p. 442; Brooke's Abr. tit. "Waste," pl. 136, fol. 327, and cases there cited.
(7) Law Rep. 2 Q. B. 135.
(8) Ibid. 18 Eq. 306.
(9) 4 Hare, 344, 373.
(10) 31 Beav. 486.
(11) 32 Beav. 509.
(12) 2 Coll. 275.
(13) 35 Beav. 635; Law Rep. 1 Eq. 656.

As to the lake, first we say that the tenant for life was in no way bound to cleanse and scour it out: *Bird* v. *Elwes* (1); and secondly, we say the Plaintiffs' evidence exaggerates the state of the lake very much.

Whitehorne, Q.C., and *H. Terrell*; Sir *A. Watson*, Q.C., and *R. F. Norton*, and *D. Sturges*, for the other Defendants, trustees and representatives of deceased trustees, took no part in this argument.

Sir *H. Davey*, in reply:—

"Timber" means great wood, as distinct from *silva cædua*, which alone is titheable, and it is said that twenty years was fixed as the age for timber after 45 Ed. 3, c. 3, which exempted timber from tithes. Timber belongs to the inheritance, and to cut it is waste, as also to cut germins or saplings which will grow to timber, though these belong not to the inheritance but to the tenant or termor, who is liable for the double value in an action of waste. By custom, timber may remain *silva cædua* up to a certain growth, and be cut by a tenant as "seasonable wood"—a term which is equivalent to *silva cædua*, and which never includes wood which has become timber: *Rex* v. *Inhabitants of Ferrybridge* (2); *Phillipps* v. *Smith* (3); but such a custom can only affect the question whether certain trees are or are not timber, not the rights which arise when they are timber. On this, evidence is inadmissible, and would, in this case, be contrary to the law that in *Bucks* beech trees are timber, and consequently to cut them waste: *Co. Litt.* (4); *Coke* (5); *Roll.* Abr. tit. "Waste" (6); *Lapthorne's Case* (7).

The old authorities cited do not establish that there may be a custom under which it is not waste to cut timber; and in speaking of "timber estates," judges must have meant oak, ash, or beech coppices. The Court never orders timber to be cut merely because it is ripe for cutting: *Hussey* v. *Hussey* (8); *Tollemache* v. *Tollemache* (9); *Seagram* v. *Knight* (10).

(1) Law Rep. 3 Ex. 225.
(2) 1 B. & C. 375, 379, note f.
(3) 14 M. & W. 589.
(4) Page 53a.
(5) 2 Inst. 643.
(6) Page 418.
(7) 1 Roll. Rep. 355.
(8) 5 Madd. 44.
(9) 1 Hare, 456.
(10) Law Rep. 3 Eq. 398; 2 Ch. 628.

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Sect. 35 of the *Settled Land Act*, 1882, contains no exception of timber estates in dealing with the proceeds of ripe timber.

What the testator did with these woods is immaterial, as he was absolute owner, and "rents and profits" in his will does not include the produce of timber: *Campbell* v. *Wardlaw* (1).

1891. Jan. 14. CHITTY, J.:—

The first and more important question relates to trees cut down by the late Lady *Dashwood* in the beech woods on the *West Wycombe* estate. By far the greater portion of the beech woods is situate in the county of *Buckingham;* a small part only lies in the adjoining county of *Oxford.* By the custom of *Buckinghamshire,* beech is timber; but there is no such alleged or proved custom in *Oxfordshire.* The cutting complained of is confined to trees of the age of twenty years and upwards. The trees cut consist mainly of beech, but comprise also a small quantity of oak, elm, and ash in the beech woods. It is admitted by Lady *Dashwood's* executors that all the trees felled were felled by her order and were sold, and that the proceeds of the sales which passed through the trustees' account were all received by her. The Plaintiffs made no demand against the trustees or their representatives. By their counsel they waived all questions of tort, and claimed only the actual proceeds of sale and without interest down to her death. On this footing they asked for an account against her executors, excluding, however, from the account beech trees cut in *Oxfordshire.* Lady *Dashwood's* title was under the will of her husband, Sir *George Dashwood,* who died in 1862. He was tenant in fee simple in possession. By his will he created a term in the *West Wycombe* estate which determined on her death. Under the trusts of this term she was entitled during her life "to the residue of the rents and profits" of the estate after payment of certain annuities, and she was also entitled to reside at and have the use and enjoyment of the mansion-house, and the lands and grounds usually in hand. The will empowered her, with the consent of the trustees, to fell such timber (not being ornamental timber) on any part of the estate as should be necessary for the purpose of the repair of the

(1) 8 App. Cas. 641.

mansion-house, and the outbuildings, park grounds, fences, gates, or appurtenances thereto belonging, or of the repair of any other houses, buildings, fences, gates, and appurtenances on other parts of the devised estates, or of similar repairs on other parts of the devised estates. The will contains no special provision as to the beech woods. The interest of Lady *Dashwood* may, therefore, for all practical purposes relating to the question now under consideration, be taken to be that of equitable tenant for life impeachable for waste, with power to cut timber for repairs. This interest she enjoyed from her husband's death to her own death in May, 1889—a period of rather more than twenty-seven years. The Plaintiffs' title is under the same will. The Plaintiff, Sir *Edwin A. Dashwood,* on the death of Lady *Dashwood,* entered into possession as tenant for life without impeachment of waste. The other Plaintiff is entitled to an estate of inheritance in remainder, but subject to a limitation in tail male in favour of the sons of Sir *Edwin.* He has no son. The argument for the Plaintiffs was shortly this. Beech being timber by the custom of *Buckinghamshire,* it is waste for termor or tenant for life to cut it after it has reached the age of twenty years. When once it has reached that age it is timber, and has all the incidents of timber. For the Defendants, the executors, it was admitted that beech was timber by the custom. But it was argued that there was a distinction between beech in the hedgerow, or the like, and beech in a beech wood. By their defence, as amended by leave in the course of the trial, they alleged that in the county of *Buckingham,* and *separatim* in that part of the county where the *West Wycombe* estate is, and *separatim* in regard to the estate itself, there is a custom that all timber and timber-like trees in the beech woods are seasonable wood, and may be cut in a due course of management and at seasonable periods, and such cutting is not waste; and that the cutting complained of was a cutting in due course of management and at seasonable periods, and in accordance with the custom pleaded. For the Plaintiffs, it was contended that there was no such custom in fact, and that any such custom was bad in law, as being repugnant to the general law relating to timber; and, further, that, in any event, the cutting was in excess of the alleged custom and

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of what would be permitted by a due course of management. In dealing with the evidence, it will be convenient to treat that which relates to the alleged customs distinctly from that which relates to a due course of management.

The Plaintiffs and the Defendants, the executors, both gave evidence in chief as to the proper course of management of beech woods generally and in the district, and also as to the course of management in the estate before the death of Sir *George Dashwood*; there was not much substantial difference between the witnesses on either side. The result, as I find the facts, is shortly as follows. The object of a due course of management of beech woods is to produce a continual succession of trees. With this view the woods are gone through at periods varying from eight to fifteen years to ascertain what trees ought to be felled. The periods vary according to the nature of the soil and position of each wood. Beech grows faster and better in the bottoms than on the hills, and faster and better on slopes facing to the north than to the south. Periodical thinnings are essential to the good condition of the woods. To pass them by would seriously injure the woods. Beech trees, after they have reached a certain age, varying with the circumstances, throw mast, or seed, which sows itself and which springs up naturally. The young trees throw mast; but the trees do not throw mast plentifully till they contain about twenty or thirty cubic feet of wood. Beech, which thus naturally maintains succession, differs in this respect from oak, which, although it will grow from the acorn that falls naturally, yet requires, in order that it may thrive well, assistance from the hand of man in planting. A beech ten years old is no bigger than a walking stick. At twenty years it has, say, five cubic feet of wood; at thirty about ten or twelve; from thirty to sixty from about forty to fifty cubic feet; between thirty and sixty it puts on wood more rapidly. After sixty or seventy years it begins to decay. The above figures as to age and cubic feet are only approximate. The growth and decay of the tree vary with the nature of the soil and situation. On a good soil and in a favourable position the decay does not begin till some time after the tree has reached the age of sixty or seventy years. Now, in going through the

woods periodically to see what trees ought to be cut down, the proper course is to select the larger trees and the trees that are growing awkwardly or stand in the way of other trees that are thriving and growing well. The reason for selecting the larger trees is this. The beech growing in the wood throws out a wide-spreading top like an umbrella, and the large trees with their wide tops deprive the trees under them of light and air; they also injure them by the drip which falls. The other trees in the wood, whether beech or oak, or ash or elm, cannot grow under the shade of the larger beech trees. To cut the larger trees, then, is to allow the smaller trees to live and thrive, and is necessary to maintain a proper succession. To cut the smaller trees or merely to thin the underwood would be to destroy the rising generations and annihilate the succession. After a given number of years if the smaller trees were cut down a few large trees would be left standing; when these were cut down the place would be bare and the wood destroyed. During the argument a metaphor was used, not inappropriately, by way of illustration—the grandfathers are removed to make way for the fathers and sons, so that they in their turn may become grandfathers and fathers, and thus each successive generation is duly brought to maturity. In regard to the customs alleged, it was not proved that there is any such custom prevailing throughout the county of *Buckingham*. But in regard to the custom alleged in that part of the county of *Buckingham* where the *West Wycombe* estate is situate, it was proved that such a custom exists in the sense presently explained. This custom was shewn to extend to the adjoining county of *Oxford*, where beech is not timber. In regard to the *West Wycombe* estate itself, the custom alleged was proved in the same sense. In the language of Mr. *Vernon*, a skilled witness for the Plaintiffs, it is a magnificent estate for the growth of beech timber. The wood books of the estate from 1798 to the death of Sir *George* were produced and proved by the Plaintiffs themselves. Sir *George's* predecessor was Sir *J. Dashwood King*. He appears to have been in possession of the estate from 1798 to 1848. His cuttings during that period average an annual £1709, and, taking into consideration that lower prices were then probably realizable, his cuttings exceeded

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those of his successors. The price of beech has since risen in consequence of the increase, particularly during the last forty years, of the chair-making industry in the district. The acreage of the beech woods on the estate is not less than 1000 acres. During Sir *George's* possession from 1848 to 1862 the yearly average was 639 loads of fifty cubic feet, the *maximum* in any one year being 829 loads, and the *minimum* 483 loads. It is convenient to mention here (although no part of the evidence as to the custom of the estate itself) that the late Lady *Dashwood's* cuttings annually averaged during the twenty-seven years she occupied the estate 620 loads from the settled estate; her *maximum* cuttings in any one year being 853 loads, and her *minimum* 402 loads. The evidence of the witnesses taken in connection with the wood books shewed to my satisfaction that, at least during the possession of Sir *George* and earlier, the beech woods were managed and cut substantially in accordance with the course of management above stated. Every wood was not cut in each year, but the woods were cut in rotation. The wood cut by Sir *George* and his predecessor was regularly sold by them for profit. The sales were held annually, and the wood was bought by the chairmakers for the purposes of their trade. The *West Wycombe* estate is situate in the centre of this industry, which extends generally to the *Chiltern Hills* district. Thus the cuttings in the *West Wycombe* woods had a close connection with the chair-making industry, and were themselves carried on as a species of trade. The trees cut, though of upwards of twenty years' growth, were in the language of the district called "poles." The chairmakers do not require very old trees for the purposes of their business—the trees cut were of an age and size most serviceable to the chairmakers.

Now, in point of law an agricultural custom or custom of husbandry, whether relating to the cultivation of the land or regulating the rights and liabilities of landlord and tenant, in the absence of agreement, need not be an immemorial custom: see *Dalby* v. *Hirst* (1); *Legh* v. *Hewitt* (2); and *Tucker* v. *Linger* (3). In *Tucker* v. *Linger* a custom for the tenant to

(1) 1 Brod. & B. 224.

(2) 4 East, 154.

(3) 8 App. Cas. 508.

take away flints turned up in the course of good husbandry and to sell them for his own profit was held good, notwithstanding a reservation of mines and minerals, although the custom had grown up within the last thirty or forty years. Indeed, it would be absurd to carry back customs of this class to the reign of *Richard* I. Common usage in the neighbourhood is sufficient. It was, I think, established by the Defendants that in regard to beech woods a usage had prevailed commonly in the neighbourhood for a long period of time of dealing with them substantially in the manner which I have already described; and also, in regard to the *West Wycombe* estate itself, of so dealing with them for a period of at least sixty-four years before Lady *Dashwood* came into possession. True it is that the title to the woods in the district was not shewn—whether, for instance, the possessor was tenant in fee simple or tenant for life, impeachable or not impeachable for waste; nor was it shewn whether Sir *George's* predecessor was tenant in fee simple or for life, with or without impeachment of waste; nor was any evidence given of disputes between landlord and tenant, or of any question having been raised between them and settled or adjusted in accordance with the alleged custom. The practice in modern times of excepting the woods from an ordinary demise to a tenant, and of inserting therein terms in the lease when the woods are included, renders it almost impracticable to adduce evidence of this kind. The evidence given was only of a general character; it certainly established this proposition—that whatever were their rights, whether as tenants in fee simple or for some lesser estate, the landowners in general in the neighbourhood treated the produce of their woods as income and not as capital. If, however, the proposition of law laid down by Sir *George Jessel* in *Honywood* v. *Honywood* (1) as to a timber estate is correct, the usage or custom of the neighbourhood or the district is immaterial. The evidence was ample to prove the practice on the estate itself. In the circumstances above stated the Defendants, the executors, contend that the *West Wycombe* estate, so far as regards the beech woods, is a timber estate, and the profits of the periodical cuttings belong to the tenant for life, and that such cuttings are not waste. They

(1) Law Rep. 18 Eq. 306.

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rely on the following passage in the judgment of Sir *G. Jessel* in *Honywood* v. *Honywood* (1): "Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profit of the estate, and, therefore, goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber; therefore, I hold in this case, it not being a timber estate, that the tenant for life cannot cut timber at all." That is what Sir *G. Jessel* has said. In the case before me it was contended for the Plaintiffs that in this passage the late Master of the Rolls was referring, not to timber trees of twenty years' growth, but to underwood or the like. This contention is inadmissible; it is opposed to the obvious sense of the passage, and to the plain and direct language of the learned Judge, who was dealing with timber in the strict sense of the term, and with an exception to the general law. It was further contended for the Plaintiffs that the statement was a mere *dictum*; that it is not supported by authority, ancient or modern; that it is contrary to principle, and that it is not law. The statement was not absolutely necessary for the decision in the particular case; but it was not a mere passing observation uttered without consideration. The Master of the Rolls was laying down the law as to timber; he deliberately stated the exception of a timber estate; he said that the exception was established by authority, principally modern, and he gave the reasons for the exception. It appears to me that I am not at liberty to refuse to follow this deliberate statement of the law unless I am convinced that it is

(1) Law Rep. 18 Eq. 309.

erroneous. The decision in *Honywood* v. *Honywood* (1) was pronounced upwards of sixteen years ago. So far as the researches of counsel have extended, and so far as I am aware, the passage above cited has never been questioned judicially nor subjected to adverse criticism by text-writers. In *White* and *Tudor's* Leading Cases (2), it is stated without comment, but as law. Before referring to the authorities prior to *Honywood* v. *Honywood*, I will make some observations on the reasons and the principle on which the exception of a timber estate appears to be founded. If the law be as stated, its operation is highly beneficial to landowners in general, and it commends itself to good sense. It enables each successive person in enjoyment to take the reasonable profits, and no more than the reasonable profits, of the woods. Waste is the destruction of the inheritance —that is the principle. The wood itself is not destroyed, but maintained, and it is so maintained as to give the largest yield of timber in perpetuity. The doctrine has some analogy to what is termed "ameliorative waste." The law on this subject is less harsh and more reasonable than it would appear to have been in Lord *Coke's* time. In *Jones* v. *Chappell* (3), the late Master of the Rolls adopted the proposition laid down in *Doe* v. *Earl of Burlington* (4), that "upon the whole there was no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or secondly, by increasing the burden upon it, or thirdly, by impairing the evidence of title"; and he stated that this law was distinctly laid down by Chief Justice *Richardson* in *Barret* v. *Barret* (5). But there is a much stronger analogy in the case of mines. It was established as long ago as the year 1344, and was settled law in Lord *Coke's* time, that it was not waste for the tenant for life to work an open mine: see *Co. Litt.* (6), and *Campbell* v. *Wardlaw* (7). Where the mine has been opened by the settlor, the tenant for life is entitled to treat the minerals gotten by himself from the mine as part of the ordinary profits

(1) Law Rep. 18 Eq. 306.
(2) 6th Ed. vol. i. p. 855.
(3) Law Rep. 20 Eq. 541.
(4) 5 B. & Ad. 507, 517.
(5) Hetley, 35.
(6) Page 54 b (1).
(7) 8 App. Cas. 645.

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of the estate. But on what principle? It is not possible to suggest any other than that referred to by Lord *Blackburn* in *Campbell* v. *Wardlaw* (1). The acts of the settlor shew an irresistible indication of his intention that the mines should be dealt with as he dealt with them, and that the mineral extracted should be deemed to be profits by all who take under his settlement. It is in vain to say that, being owner, he may do what he likes with his own. If that principle had been adopted, the tenant for life could not have taken the minerals. It is consistent with this reasoning to hold that, where the settlor has cultivated the woods for the purpose of annual or other periodical profit, the tenant for life may cultivate them and take the profits in a similar manner. The case of the opened mine goes further than that of woods treated by the settlor as crops. The coal extracted by the tenant for life is wholly lost to the inheritance; the wood periodically cropped in a due course of management is preserved for the continual benefit of the inheritance. There is also some analogy to be found in the case of waste by alteration of the course of husbandry or cultivation, as in converting ancient pasture or meadow into arable land: see *Co. Litt.* (2) and *Woodfall's* Landlord and Tenant (3). Ancient pasture here does not mean pasture from time immemorial, but only that which the settlor has kept as pasture. In this case also the course of dealing with the land adopted by the settlor appears to afford the governing rule as to rights of a tenant for life. The Master of the Rolls did not specify the authorities by which the exception of the timber estate had been established. Possibly he had in his mind some decisions which were not reported. Of the reported modern decisions he probably was referring (amongst others) to *Ferrand* v. *Wilson* (4); *Bateman* v. *Hotchkin* (5); *Bagot* v. *Bagot* (6); and *Earl Cowley* v. *Wellesley* (7). In *Ferrand* v. *Wilson*, the material part of the judgment occurs at pages 373 and 374. The Vice-Chancellor *Wigram* was dealing with a question of perpetuity in connection with a special power to cut timber.

(1) 8 App. Cas. 645.
(2) Page 53 b.
(3) 13th Ed. p. 608.
(4) 4 Hare, 344.
(5) 31 Beav. 486.
(6) 32 Beav. 509.
(7) 35 Beav. 635; Law Rep. 1 Eq. 656.

He uses the term "timber estate" frequently, and as a term well known at the time of his judgment (1845). He points out the fallacy of applying to a timber estate observations which apply only to a single tree, and he treats the profits derived from a timber estate as annual or ordinary profits of the estate. He explains that such an estate is bought with reference to an annual return, and that the rent to be got from the woods, though the average cutting from one stool (he was dealing with a case of cutting from the stool) is only once in twelve or fourteen years, can be calculated with as much exactness as the rents from any other part of the estate. Now, it is quite true that the Vice-Chancellor was not directing his attention to a question of waste; but the gist of his observations is to place the profits of a "timber estate" on the same footing as ordinary rents and profits. In *Bateman* v. *Hotchkin* (1), Sir *John Romilly* in 1862 held that the tenant for life was entitled to all fair and proper thinnings, and also to all coppices cut periodically in the nature of crops. The order is stated in *Seton* on Decrees (2), from which it appears that the tenant for life was allowed the benefit of all proper thinnings and all coppices which were periodically cut in the nature of crops, whether osiers, hazel, or "oak," and that, to ascertain the amount of the allowance, an inquiry was directed to ascertain what portion of the money received by him was derived from timber or cuttings of that description. I see no sufficient ground for holding that, in this formal order of the Court, the term "timber" was not used in its proper legal signification as applied to oak, viz., oak of twenty years' growth and upwards. In the subsequent case of *Bagot* v. *Bagot* (3), Sir *J. Romilly* laid it down (4), that "it does not follow that all cutting of timber is waste." He said: "In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, *i.e.*, every thirty-two or thirty-six years. This timber would, I apprehend, constitute the fair profits of the land to which the tenant for life would be entitled. So also, I apprehend, that proper and regular thinning of a wood, for the purpose of

(1) 31 Beav. 486.
(2) 4th Ed. p. 187.
(3) 32 Beav. 509.
(4) Ibid. 517.

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improving the rest of the trees within certain limits, would not amount to a waste." He there deals with regular periodical cuttings of timber, and thinnings for the purpose of improving the wood, as distinct things. His decree appears to have been drawn on this footing. On appeal to the Lord Chancellor, a compromise was effected; but there were many other questions in the suit besides that to which the above observations were addressed, and the decision must be treated by me as an authority. The cuttings of the oak coppice every thirty-two or thirty-six years spoken of by Sir *John Romilly* must obviously have been cuttings of oak of over twenty years' growth. There is no ground for confining the word coppice (as the Plaintiffs' counsel attempted to do) in this passage to underwood in the sense contended for, viz., underwood of oak of less than twenty years' growth. Etymologically, the word coppice is derived from the French word *couper*, to cut. Sir *John Romilly* expressly speaks of the thing cut, as timber. Again, the thinning he speaks of is not confined to underwood. Proper thinning must depend on the nature of the trees. Proper thinning of a wood in which the oak is the principal tree would, as I apprehend, leave standing the larger oaks, except when they interfered with each other's growth; proper thinning in a beech wood is (as the evidence before me proved) to fell the larger trees for the due succession. In *Lord Cowley* v. *Wellesley* (1), Lord *Romilly* held that the whole of the produce of timber, cut in the usual and regular course as thinnings on the estate in *Hampshire*, belonged to the tenant for life. It was proved that such a course of management had prevailed on that estate for many years; but in regard to timber cut on the estate in *Wiltshire*, where no such course of management was shewn, the produce of timber, felled to improve the growth of other trees, was decided to be capital. One other modern authority is worthy of citation. In the judgment of the Court of Exchequer, in *Phillipps* v. *Smith* (2), it is laid down that the cuttings even of oaks and ashes, where they are of seasonable wood—*i.e.*, where they are usually cut as underwood, and in due course are left to grow up again from the stumps—is not waste. The phrase "cut as underwood" appears to mean "cut as underwood

(1) 35 Beav. 635; Law Rep. 1 Eq. 656. (2) 14 M. & W. 594.

is cut," and to be equivalent to cut as a periodical crop. Reference may also be made to a statement in *Woodfall's* Landlord and Tenant (1), that in some counties, especially in *Kent*, they are in the habit of cutting down wood as underwood at twenty-six, twenty-eight, or thirty years, which, if allowed to grow, would become valuable timber. But I do not refer to this as a binding authority. In 1 *Cruise's* Digest (2), published in 1835, a text-book of some weight, though not binding as an authority, the following passage occurs: "Timber trees are those which serve for building or reparation of houses, such as oak, ash, and elm of the age of twenty years and upwards. But where oak and ash are seasonable wood and have been usually cut down at certain periods, it was formerly held that it was not waste to cut them down at that time; but I can find no modern decision on this point." He cites *Viner's* Abridgment in the margin. He seems to stand between the older authorities and the modern decisions to which I have above referred. There seems, then, to be sufficient modern authority to justify the statement of the law in *Honywood* v. *Honywood* (3). Having reviewed at some length the modern decisions and expressed my opinion upon the result, I do not propose to deal exhaustively with the older authorities which were cited at the Bar. Some of these are not free from obscurity. In the abridgments there is as usual some repetition. It must be admitted that they do not contain any definite or precise statement directly supporting Sir *George Jessel's* doctrine as to a timber estate, but they do contain passages tending to support it and the principle on which it is founded. The difference between a woody country and an agricultural country was pointed out by Mr. Justice *Martin* in a passage which occurs in *Brooke's* Abridgment (4). After a statement, apparently made or accepted by the Court, that, according to the Year Book, 11 Hen. 6, if oaks pass the age of twenty years the tenant-farmer may not cut them, Mr. Justice *Martin* laid it down that "it is waste in an agricultural country, and not waste in a woody country in divers instances, and thus custom (or usage) makes the law in divers countries." *Brooke* calls

(1) 13th Ed. p. 620.
(2) 4th Ed. p. 116, s. 5.
(3) Law Rep. 18 Eq. 306.
(4) Tit. "Waste," fol. 327, pl. 134.

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attention to the distinction in a marginal note. The rest of the Court appears to have acquiesced in Mr. Justice *Martin's* statement of the law. The distinction drawn by Vice-Chancellor *Wigram*, in *Ferrand* v. *Wilson* (1), between trees in a wood and a single tree, is in accordance with, and may have been founded on, the passage in *Brooke*. Further, it is stated in *Viner's* Abridgment, tit. "Waste," E, that in some countries where there is great plenty, oaks of the age of twenty years are but seasonable wood (2), and that the termor may take oaks, ashes, &c., which are seasonable wood, which have been used to be felled every twenty, sixteen, or fourteen years (3). There must apparently be a custom or usage to justify the cutting, and the custom may be alleged not merely in the hundred or vill, but in the wood itself: see *Viner's* Abridgment (2) and (3), and *Brooke's* Abridgment (4), and also *Fitzherbert, De Natura Brevium* (5). This is important as shewing that the custom or usage may be confined to a small local area, and that it may lawfully exist not merely in the vill, but in the wood itself. Custom in the wood itself must mean usage of some standing, but not immemorial, by, or by the permission of, the owners of the wood, or, in other words, usage derived from the mode in which the wood has been dealt with. Further, some apparently held that the termor might take "oaks, ashes, &c., at twenty-five or twenty-seven or thirty years, if they be seasonable wood, which is called *silva cædua*": see *Viner's* Abridgment, "Waste" (6). In an anonymous case decided in 23 Eliz., and reported by *Godbolt* (7), it appears to have been laid down by Chief Justice *Dyer* and the rest of the Court of Common Pleas that termor or tenant for life might "fell seasonable wood, which is called *silva cædua* at twenty-six, twenty-eight, and thirty years by the custom of the country, and so the usage makes the law in several counties." This statement was made upon the question moved, What shall be said to be seasonable underwood that a termor or tenant for life may cut? The authorities referred to by the Court were apparently Year Books,

(1) 4 Hare, 344.
(2) Pl. 6.
(3) Pl. 6, n.
(4) Tit. "Waste," fol. 327, pl. 134.
(5) Page 59 m.
(6) Pl. 7, n.
(7) Page 4.

11 Hen. 6 and 4 E. 6. This seems to shew that seasonable wood might include by the custom of the country timber trees of more than twenty years' growth. The result appears to be that, though to cut oaks or other timber trees was *primâ facie* waste (as it undoubtedly is at the present time), it was not, according to the opinion of at least some of the ancient lawyers, waste where the trees are in a wood, and there is a usage to cut them in regular course for the benefit of the wood as a whole, even though the usage be confined to the wood itself. A case on which the Plaintiffs' counsel laid great stress in their argument was *Aubrey* v. *Fisher* (1), decided in 1809. This was a rating case under the now repealed Act, 43 Eliz. c. 2, and the question was whether certain beech woods in *Buckinghamshire* were liable to be rated to the relief of the poor as "saleable underwoods" within the meaning of the statute. It was admitted generally that beech was timber by the custom of the county. The jury, under the direction of the Judge, found that the woods were not saleable underwoods. On a motion for a new trial, the Court was disposed to think that the beech trees felled in the woods were not underwoods, but held that clearly they were not "saleable underwoods" within the statute. The actual question there was a narrow one, turning on the construction of the statute. Similar cases depending on the statutory meaning of saleable underwoods are those of *Rex* v. *Inhabitants of Ferrybridge* (2); *Rex* v. *Inhabitants of Mirfield* (3); and *Lord Fitzhardinge* v. *Pritchett* (4). There are passages in the judgments delivered in *Aubrey* v. *Fisher* to the effect that where beech is declared to be timber by the custom it must be taken to be timber according to the rules of the common law respecting timber, and to carry with it all the properties and consequences of timber by the general law. But the question whether it was saleable underwood was treated as a question of fact, and, as was observed by Mr. Justice *Le Blanc*, all the witnesses agreed that "this had none of the qualities of underwood, and that it was never managed or treated as such." The decision, therefore, as it appears to me, does not apply to the case where beech woods

(1) 10 East, 446.
(2) 1 B. & C. 375.
(3) 10 East, 219.
(4) Law Rep. 2 Q. B. 135.

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have been managed and treated as underwoods, or to a case between tenant for life and remainderman. In *Fitzhardinge* v. *Pritchett* (1) it was held that the question whether woods are "saleable underwoods" within the statute depended on the mode and object of their cultivation, and, if these were to produce a succession of profitable crops from the same stools and roots, that the woods so treated are "saleable underwoods"; that it was immaterial at what intervals the successive crops were cut, and of what species of tree the woods consisted. In that case Mr. Justice *Mellor* in his judgment said the circumstance that the woods were cut at an interval of ten, fifteen, or even thirty years was immaterial. The woods contained beech trees, which were admitted to be timber according to the custom of the county (*Gloucester*). The mode of management appears to have been different from that proved in the evidence before me. Where the coppice was purely oak, it was cut down clean at about twenty-one years' growth. I may here observe that the law has shewn peculiar indulgence to local usage in regard to trees both as to the nature of the tree and the age at which the tree is accounted timber. A collection of instances will be found in *Craig* on Trees, and *Woodfall's* Landlord and Tenant (2). There seems to have been a disposition on the part of Lord *Ellenborough* and his colleagues, evinced in some of their observations in *Aubrey* v. *Fisher* (3), to restrict this indulgence. I must not, however, be understood as in any way questioning the decision itself in that case. It was argued for the Plaintiffs that the express power conferred on Lady *Dashwood* to cut timber for repairs was inconsistent with any right on her part to cut timber in the woods. But it appears to me that this power does not control or affect her rights to the "profits" of the whole estate, including the profits of the woods. In the course of her cuttings in the beech woods Lady *Dashwood* felled some few oak, ash, and elm trees. These were cut in the same course of management as the beech trees themselves. Assuming that they were not cut for repairs, I hold that the oaks, ashes, and elms must follow the fate of the beeches. As to the subordinate point raised, whether

(1) Law Rep. 2 Q. B. 135. (2) 13th Ed. p. 616.
(3) 10 East, 446.

the cuttings of Lady *Dashwood* were not in excess of what was justifiable by a due course of management, the evidence was conflicting. But, having regard to the condition of the woods generally, taken one with another, at the death of Lady *Dashwood*, as compared with their state at the death of her husband, and to the fact that her average cuttings were somewhat less than the average cuttings of Sir *George*, and, as I infer, less than the average cuttings of his predecessor, and on the balance of the evidence I hold that her cuttings were not in excess of her right, the result is that Lady *Dashwood's* executors are not accountable for any cuttings by her.

The other question relates to the lake. It consists of two sheets of water connected by a channel covering altogether about fourteen or fifteen acres, and lying in the park near the mansion-house. By his will the testator directed and declared that his wife and every other person who during the term should become entitled to the actual possession or to the receipt of the rents and profits or the surplus rents and profits of his estates should "from time to time keep" his "mansion-house at *West Wycombe* and the outbuildings, parks, grounds, fences, gates, and appurtenances thereto belonging, in good and substantial repair, order, and condition." This imposed on Lady *Dashwood* an equitable obligation corresponding with the terms of the declaration. The complaint made by the statement of claim (1) is that Lady *Dashwood*, by her neglect, suffered the lake to become foul and choked with weeds, mud, and filth, to the prejudice of the health of the occupiers of the house and otherwise to the detriment of the Plaintiffs. The Plaintiffs failed to prove that at Lady *Dashwood's* death the condition of the lake was prejudicial to health. Indeed, they gave no evidence to that effect. By their evidence they launched their case as if the obligation were an absolute obligation to put the lake into such a condition as would meet all the modern notions as to the state in which such a lake ought to be. Their principal witnesses, such as Mr. *Vernon* and Mr. *Watney*, were *London* surveyors. The will was made in 1855. The obligation was not to put the property described in the declaration into a good

(1) Page 9.

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condition, but to keep it in a good condition, which must be held to mean a good condition regard being had to its state and condition generally at the testator's death.

Even in a demise of a house, a covenant to keep it in repair is held to have reference to its age and condition generally at the time of the demise. The state of the lake at the testator's death must be taken into consideration. It certainly was not his intention, nor is it the true construction of the declaration, that if his widow had been in enjoyment of the property for a few weeks or months after his death she should incur the liability of putting the lake into such a condition as was described by the Plaintiffs' expert witnesses. The Plaintiffs' case, as developed by their witnesses of this class, was, they were entitled to recover damages or compensation for the breach of the declaration a sum amounting to about £2000. According to these witnesses the mud at the bottom of the principal sheet of water, the extent of which is about nine acres, ought to be removed to an average depth of one foot.

The Plaintiffs gave no evidence, or certainly no evidence of any weight, as to the condition of the lake at Sir *George's* death. They confined themselves (speaking generally) to the condition at or since Lady *Dashwood's* death. They shewed that at this time there was a considerable deposit of mud. Some of this, but less than a rood, was the result of sewage drained into the lake: the rest resulted from natural causes. As to the sewage, it was proved that at Sir *George's* death the overflow of the cesspools from the house and the slops from the laundry found their way into the lake by pipes. Before her death Lady *Dashwood* diverted this overflow and draining at her own expense. At Sir *George's* death the village also drained into the lake; but this sewage was wholly or for the greater part intercepted and diverted before she died. She was also at some expense in cleansing a small part of the bottom of the lake. An excellent witness, and the best in my opinion in regard to the lake, was Mr. *Brinckman*, who had charge of the fishing for many years during Lady *Dashwood's* possession, and who knew it well in her husband's time. In regard to the state of the weeds of which the Plaintiffs complained, the Defendants, the

executors, proved to my satisfaction that Sir *George* would not allow them to be cut. He kept them uncut and encouraged them for the sake of the wild ducks which resorted in large numbers to the lake in the winter. There were and are fish in the lake, chiefly trout, and these fish, according to one of the Plaintiffs' witnesses, thrive on fresh sewage. To have destroyed the fish in the lake would have been waste: see *Co. Litt.* (1). But no complaint was made as to the fish. According to the evidence of the Plaintiffs' skilled surveyors, a lake ought to be cleansed out and the mud removed once in thirty or forty, or perhaps fifty years. But no practice to clear the mud out of this lake was proved. On the contrary, so far as the evidence went, and with the exception of such clearing of some small portion as was done by Lady *Dashwood*, the lake appears never to have been cleared out at all from the time of its formation, whenever that took place; much less was there any proof of any periodical clearing, nor was there any evidence to shew during what period the mud and filth had accumulated. The mud which was deposited (apart from the sewage) accumulated by natural causes, such as the falling of the leaves, decay of weeds and other vegetable matter, and the bringing down of the *detritus* by the stream. Lady *Dashwood* caused the flags at the margin of the lake to be cut from time to time. There were springs in the lake itself; but the supply of water from them for a period of some ten years or so before Lady *Dashwood's* death had been deficient. In fact, the supply of water generally in the district where the soil is chalky had been low during this period. This appears to have contributed in a material degree to the appearance of the weeds on the surface, as shewn in the photographs which were taken at a time of the year when the weeds were highest and the water lowest. The lake appears to have been at times liable to a deficiency in the water supply. Mr. *Brinckman* remembered that in 1859 the lake was dried up altogether, so that his sister walked across it in that year. A greater flow from the springs and an abundant supply of water in the district causing a flood would have to some extent cleared off the mud. The Plaintiffs' witnesses said that a punt pole pushed

(1) Page 53 b.

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down into the lake brought up mud which smelled: any one with experience of stagnant or sluggish waters would know that mud thus brought up from the bottom always has some smell about it. In 1884, the water was drawn off for the purpose of catching fish, and Mr. *Brinckman*, who was present and took an active part in the operation, proved that there then was little or no smell in the mud. He also shewed that in a fish pond there ought to be a foot of mud or so. In Sir *George's* time there was a wilderness of nettles and brambles, and all sorts of rubbish running down to the lake. Lady *Dashwood* cleared this away and made a beautiful lawn by the lake, so that all the rain-water flowed into it.

Now, recurring to the declaration in the will, it is observable that the lake is not even mentioned; much less is anything said about cleansing or scouring it. Had it been the intention of the testator that his widow and the other persons who might succeed her in the enjoyment of the lake should have been placed under a liability of that kind involving a heavy expenditure, one would have expected that his will would have contained some definite directions on the subject. In contrast with the silence on this point there stand the express directions as to the fences and gates. It cannot, I think, be questioned that the declaration had some reference to the lake. For instance, Lady *Dashwood* was, I think, bound to keep the banks and the sluices in good and substantial repair, order, and condition. On these matters, no complaint was made. But to import from the general words of the declaration an obligation on her part to scour and cleanse the lake at some period or periods not defined is quite another matter. On this point there is authority, not decisive, but of considerable importance.

In *Bird* v. *Elwes* (1), the landlord agreed to keep the premises in repair. The property demised included a piece of ornamental water. An accumulation of mud took place in this water causing a nuisance. The tenant being summoned under the *Nuisance Removal Act*, 1855, employed a contractor to scour and cleanse the ornamental water, and then sued the landlord on the agreement. It was held that the landlord was not liable. The allowing the mud to accumulate was not a breach of the agree-

(1) Law Rep. 3 Ex. 225.

ment. That was not the meaning of the contract. At the utmost, said the Chief Baron *Kelly*, in delivering his judgment, the contract would only apply to bind the landlord to do such repairs, as for instance might be required to prevent the sluices from bursting and the water from going over its banks and flooding the neighbouring lands; but it could not bind him to cleanse and scour the stream. It was suggested, but not proved, by the Plaintiffs, that Lady *Dashwood* might by timely acts have kept down the extent of the mud; but I apprehend that the only proper mode of removing the mud is to drain off the water and carry off the mud by one extensive operation, carting away the mud or spreading it over the surface of the park. Fifteen acres superficial of mud to a depth of one foot would, if spread over the land to a depth of one inch, cover 180 acres of ground. The nature and extent of the operation required to clean out the mud appear to me to point to an expenditure on account of capital rather than of income.

The result is, that in my opinion the Plaintiffs have failed to establish any liability on the part of Lady *Dashwood's* estate in respect of the lake.

The action relates also to a claim for neglect to keep the mansion-house in repair, and to heirlooms and some smaller matters. As to the mansion-house, the parties have agreed to the amount of the dilapidations, and the money has been paid into Court. As to the heirlooms, the principal question was decided on a summons taken out by the surviving trustee before the writ in this action was issued. No question was raised at the Bar beyond those on which I have given my judgment. The Defendants, the executors, must pay the costs of the Plaintiffs, and the Defendant, the surviving trustee, of so much of the action as relates to the repairs of the mansion-house. The surviving trustee was a proper party to this part of the action. The rest of the action is dismissed. The Plaintiffs must pay the costs of all the Defendants of so much of the action as is dismissed. There will be the usual set-off as between the Plaintiffs and the Defendants, the executors of Lady *Dashwood*. The order will be drawn so as to split the general costs.

W. C. D.

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The Plaintiffs then served the Defendants, Lady *Dashwood's* executors, and the present trustees of Sir *G. H. Dashwood's* will, with notice of appeal to have Mr. Justice *Chitty's* judgment reversed so far as the relief sought in the action related to the cutting of timber (including beech), upon so much of the testator's estates as were situate in *Buckinghamshire*, and of timber (not including beech) upon so much of the estates as were situate in *Oxfordshire*, during the period between the deaths of the testator and his widow; and to have it declared that the Defendants, Lady *Dashwood's* executors, they having admitted assets for the purpose, were liable to account for and pay to the Plaintiffs the aggregate amount of all moneys received by or come to the hands of Lady *Dashwood* or of such Defendants, as her representatives, in respect of all such cuttings of timber (by whomsoever cut) upon the said estates during the period aforesaid (other than timber cut for repairs under the power in the will), with interest at 4 per cent. per annum from Lady *Dashwood's* death; and for an order for payment accordingly.

C. A. The appeal was heard on the 19th, 20th, 21st, and 23rd of March, 1891.

In the course of the argument on appeal, it was admitted on the part of the Plaintiffs, that with regard to the beech trees on the small portion of the *West Wycombe* estate that was situate in *Oxfordshire*, those trees could not be treated as "timber" and that therefore Lady *Dashwood* had the right to cut them. Accordingly, the contest, so far as it related to the right of cutting beech trees, was confined to the question whether, as to beech "timber" in the beech woods on the rest of the estate, namely, the portion situate in *Buckinghamshire*, Lady *Dashwood* had acted within her rights under the will in cutting it.

There was no appeal upon the question of the condition of the lake and ornamental waters.

Sir *H. Davey*, Q.C., *Latham*, Q.C., *H. Fellows*, and *P. H. Lawrence*, for the Appellants:—

We do not complain of improper cutting: we assume that the trees cut were such as would have been cut by the Court; but we say that the proceeds ought to have been invested, and the

income only paid to the tenant for life. The next tenant for life being unimpeachable for waste, is entitled to the *corpus*: *Gent* v. *Harrison* (1); *Lowndes* v. *Norton* (2). The Court takes judicial notice of the custom of *Buckinghamshire* that beech is timber: *Co. Litt.* (3); *Aubrey* v. *Fisher* (4); *Lapthorne's Case* (5); *Rolle's* Abridgment, "Waste" (6). The Respondents admit that beech is timber, but seek to deprive it of the legal incidents of timber. The main ground of the decision below was that the case of what is called a "timber estate" is an exception to the general rule that a tenant for life impeachable for waste cannot cut timber; that is, that where an estate is thickly timbered and the timber is cut periodically in due course of management, the successive falls are to be treated as crops.

[KAY, L.J.:—Suppose a tenant for life were to plant a great part of the estate thickly with timber, he would take away from subsequent tenants for life the agricultural value of the land, and they would get nothing unless the falls are treated as crops.]

Unless he was unimpeachable for waste he could not legally alter the character of the estate in that way. The Respondents rely on *Honywood* v. *Honywood* (7), before Sir *G. Jessel*, M.R.; but what they rely on is really only a *dictum* of that learned Judge (8), which is to the effect that a tenant for life, though impeachable for waste, may, on a "timber estate"—that is, an estate cultivated merely for the produce of saleable timber—cut timber periodically as part of the annual profits, this being, it is stated, an exception to the general law that such a tenant for life cannot cut timber. This *dictum*, however, was not necessary to the decision of the case, and although the Master of the Rolls says that the supposed exception is founded on modern authorities, the authorities do not support it.

[BOWEN, L.J.:—Where is the expression "timber estate" first found?]

We believe that it first occurs in *Ferrand* v. *Wilson* (9). The

(1) Joh. 517, 523.
(2) 6 Ch. D. 139.
(3) Page 53a.
(4) 10 East, 446.
(5) 1 Roll. Rep. 355.
(6) Page 814.
(7) Law Rep. 18 Eq. 306.
(8) Ibid. 310.
(9) 4 Hare, 344.

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remarks of Lord *Romilly* in *Bagot* v. *Bagot* (1) have been referred to, but they seem to have been only a casual expression of opinion, and are not entitled to any great weight, and moreover, they relate only to cutting poles in an oak coppice, not to cutting timber; and the case of *Pidgeley* v. *Rawling* (2), to which he refers, was only a case of coppice, not timber. The supposed exception would introduce great uncertainty. How is it to be decided whether an estate is sufficiently timbered to be a "timber estate"? The observations in *Ferrand* v. *Wilson* (3), referring to *Waldo* v. *Waldo* (4), do not support the view of Sir *George Jessel*, and there are only three cases which can be referred to as doing so, namely, *Bateman* v. *Hotchkin* (5), *Bagot* v. *Bagot* (6), and *Earl Cowley* v. *Wellesley* (7), as to which last case Sir *G. Jessel* said, in *Honywood* v. *Honywood* (8), that he had sent for the special case, and it appeared that the thinnings on the *Wiltshire* estate were young plantations, and not properly timber at all. As to *Earl Cowley* v. *Wellesley*, it is difficult to see how what the testator, Lord *Mornington*, the absolute owner of the estates, chose to do as to the management of his timber could alter the rights of persons claiming under his will. The case is quite consistent with law if "timber" is understood as there meaning "timber trees"—that is, trees which would become timber if they stood long enough.

[KAY, L.J., referred to *Tooker* v. *Annesley* (9).]

That case is important as deciding the right of the tenant for life to the income arising from timber cut by the order of the Court. The Court, in felling timber decaying or damaging other timber, acts for the benefit of all parties. If the new doctrine now advanced had been introduced at the time *Tooker* v. *Annesley* was decided, there would have been no occasion to apply to the Court, for the tenant for life might himself have cut the timber. *Hussey* v. *Hussey* (10) puts very neatly and clearly the equity which arises when the Court cuts timber. In

(1) 32 Beav. 509, 517.
(2) 2 Coll. 275.
(3) 4 Hare, 381.
(4) 7 Sim. 261.
(5) 31 Beav. 486; 32 L. J. (Ch.) 6.
(6) 32 Beav. 509.
(7) 35 Beav. 635; Law Rep. 1 Eq. 656.
(8) Law Rep. 18 Eq. 307.
(9) 5 Sim. 235.
(10) 5 Madd. 44.

that case the difference should be noticed between the directions there given as to an estate of which the infant was tenant in tail in possession, and those given as to an estate of which he was tenant in tail in remainder after a life estate impeachable for waste.

The Respondents set up a custom to justify this felling of timber. We demur to the allegation that there is such a custom, for we say that such a custom would be self-contradictory, unreasonable, and contrary to the common law; and that, according to *Aubrey* v. *Fisher* (1), when it is once established that by the custom of a district certain trees are timber, they are to be treated as timber to all intents and purposes, and subject to the rules of law as to timber, and that the custom cannot be modified so as to introduce a different rule as to felling trees of that description. Moreover, we say that the evidence is wholly insufficient to establish any such custom as is now alleged; and, in the absence of custom, felling trees which are not "seasonable wood"—that is, usually cut as underwood—is waste at common law: *Phillipps* v. *Smith* (2). The Respondents urged below that if there was not a custom in the strict sense of the word, there was a usage to which regard must be had, as in cases between landlord and tenant. But though in an agreement of tenancy the usage of the neighbourhood may be imported because the parties are presumed to have embodied it in their agreement, it would be a fallacy to apply this to any case but a case of contract. The remarks in *Campbell* v. *Wardlaw* (3) apply here. There is a sort of analogy between this case and the case of an opened mine; but that is not enough to enable the Court to say that a cutting of timber which has been carried on by the absolute owner may be continued by a tenant for life impeachable for waste. The old cases are collected in a note to *Rex* v. *Inhabitants of Ferrybridge* (4). They shew that the general rule that timber trees become timber at the age of twenty years may be modified by the custom of the country; but they do not tend to shew that timber can ever come under the head of "seasonable wood," or *silva cædua*. When once a tree becomes timber it ceases to be

(1) 10 East, 446.
(2) 14 M. & W. 589.
(3) 8 App. Cas. 641, 645.
(4) 1 B. & C. 375, 379.

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"seasonable wood" or "*silva cædua*": *Vin.* Abr. "Waste" (1); *Fitzherbert, Nat. Brev.* (2); *Brooke's* Abr. "Waste" (3). Thus, if beech becomes "timber," there cannot be a custom to cut it as seasonable wood. *Lozon* v. *Pryse* (4) goes no further than to shew that trees of the growth of twenty years and upwards sprung from an old stool are exempted from tithe under 45 Ed. 3, c. 3; it does not deal with the question of waste as between tenant for life and remainderman. The will in the present case made Lady *Dashwood* impeachable for waste, giving her power to cut timber for repairs, and made the other tenants for life unimpeachable for waste: this is strongly against the Respondents' contention that she had the extensive power of cutting timber which she claimed.

Rigby, Q.C., *Byrne*, Q.C., and *T. Ribton*, for the Respondents, the executors of Lady *Dashwood*:—

Unless the practice of periodical felling is carried on upon a timber estate, the tenant for life cannot get any profit at all from the estate. We say that timber and timber-like trees growing in woods are seasonable wood. Where trees are so planted together that cutting them down periodically is necessary for the good of the estate, and it has been the custom and practice to do so, then we say that a tenant for life may lawfully continue such periodical cutting. The first question is, What is a "timber estate"? It is difficult to define it precisely. It is not an estate on which there is a great deal of timber; nor is it an estate the entire revenue of which is derived from the sale of timber. A timber estate is an estate the whole or a part of which is cultivated in such a way that whatever is taken out of it is taken, not so much for the sake of the immediate value of what is taken, as with a view to the preservation of the estate by allowing a succession of timber in due course to grow up. It includes more than coppice, in which trees are so cut down periodically as to admit of their growing again on the same stools. It is an estate the possession of which confers the right of cutting down large timber trees once for all, so that they may

(1) (E), pl. 6, 7.
(2) 9th Ed. page 59 M.
(3) Pl. 133, 136.
(4) 4 My. & Cr. 600.

not grow again. The very essence of the idea of a timber estate is that the trees in a wood on it are cut down, not for the sake of their immediate value, but under a settled course of forestry or management with the view to the preservation of the wood as an entire thing. In other words, the main object of taking away the trees is to secure a succession by making room for other trees to spring up. We say that the *West Wycombe* estate is a timber estate of a nature such as we have described. Dealing, then, with the case of a timber estate, is the cutting of timber, with a view to the preservation of the estate, within the legal conception of "waste"? We submit not. The legal conception of "waste" is destruction; and where the object is preservation, and not destruction, the cutting of timber is not waste: *Co. Litt.* (1) citing *Bracton*, *Fleta*, and *Britton*. A timber estate, or an estate on which cultivation goes on for the purpose of dealing with the trees as crops, forms an exception to the general rule with regard to waste. Timber may be rateable to the poor as "saleable underwoods," under 43 Eliz. c. 2, s. 19: *Lord Fitzhardinge* v. *Pritchett* (2). It was also formerly subject to tithe as *silva cædua*: *Lozon* v. *Pryse* (3); and hence the statute of 45 Ed. 3, c. 3, was passed, prohibiting its being taken for tithe. There can be no doubt that, by custom, that would not be waste which otherwise would be so. Custom may vary the rights of property, and may change the nature of an act done by a tenant for life. On a timber estate custom may give him the right to something beyond the mere common law right of periodical thinning. For instance, a tenant for life may, by custom, be entitled to cut oak of full age, where, in the absence of custom, he would, in cutting it, be a wrongdoer. Custom may establish what particular trees shall at any particular time be regarded as "timber." It is not necessary to prove immemorial custom: it is sufficient to prove local usage and practice. Thus, to an action for waste it may be pleaded that it had been the usage to cut wood as seasonable wood in the particular locality. The authorities clearly shew that the particular time at which trees become timber may be fixed by custom or usage. For example, custom may say that a tree

(1) Page 53 b.

(2) Law Rep. 2 Q. B. 135.

(3) 4 My. & Cr. 604.

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shall not be timber at twenty years of age, but at some other age. Thus, it may say that oak is not timber until the age of twenty-five or thirty years, or some other time. We do not deny that in *Buckinghamshire* beech is "timber"; but that does not put an end to the question. The circumstances under which it has become timber must be regarded. The evidence shews that, according to custom and practice in *Buckinghamshire*, beech trees are treated as "seasonable wood"—or, as it is termed in the old authorities, *silva cædua*—that is, wood which may be cut in due course of management at seasonable periods—wood which may be properly felled at a seasonable time.

[KAY, L.J.:—Has the term "seasonable" ever been applied to trees which are cut down once for all, and not merely to trees which are cut so that they may grow again from the same stools?]

By "seasonable trees" are meant trees which have a season for cutting by reason of the situation in which they are growing: for instance, where their growth becomes detrimental to other trees they may then be removed.

[KAY, L.J.:—You mean trees that have become injurious to what is intended to be left?]

Yes; as one of the witnesses says, the practice is where it is found that a tree prevents light and air from coming into the wood to cut away that tree regardless of its particular description.

As to custom affecting the question of waste, it is clear that custom may alter the right of ownership in trees. Taking, by analogy, the case of a copyhold estate, the custom of the manor may vest the right to the trees on the estate in the copyholder, where otherwise they would not be his. It is not correct to say that custom has only to do with contract, and that it is only in a case of contract that custom may be looked at. Custom may be regarded quite independently of contract: *Tucker* v. *Linger* (1).

[KAY, L.J.:—The question is whether a person who is prohibited from committing waste can do that which, but for some alleged custom to the contrary, would be "waste."]

(1) 8 App. Cas. 508.

Where you find a custom fixing a particular mode of management of an estate, it is immaterial whether the tenant for the time being is impeachable for waste. In a case of contract, if the matter of "waste" is left unmentioned, the custom or usage prevails unless it can be contradicted. Where the document under which the tenant is in possession is, so to say, neutral, as is the case here, then the custom or usage prevails.

[LINDLEY, L.J.:—Does usage prevent what Lady *Dashwood* did from being "waste"?]

Yes; where the timber cut is "seasonable wood": *Rex* v. *Inhabitants of Ferrybridge* (1); Year Book, 11 Hen. 6 (2).

[LINDLEY, L.J.:—Is there any case which supports the general proposition that it is not waste at common law, on the part of a limited owner impeachable for waste, to cut timber trees with the object and effect of ameliorating the estate?]

We cannot produce any authority directly in support of that proposition; but it is clear that the law of waste is not now so strict as it was formerly. It originated by statute, but in course of time it became less stringent, and, as the subject became more understood, the authorities favoured the view we now take. Thus, *Jones* v. *Chappell* (3) is an instance of the relaxation of the earlier law upon this subject. There the late Master of the Rolls, Sir *G. Jessel*, stated that there was no authority for saying that an act could be waste which was not prejudicial to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden upon it—which latter point is at the root of what is termed "ameliorating waste"; and he refers with approval to *Barret* v. *Barret* (4) as so settling the law; and in *Doe* v. *Earl of Burlington* (5) Lord *Denman* also cites *Barret* v. *Barret* to that effect.

[KAY, L.J.:—There seems to be no doubt that the doctrine has been relaxed as to houses: *Doherty* v. *Allman* (6). The question is whether it has been relaxed in the case of anything else but houses.]

(1) 1 B. & C. 375.
(2) Page 1.
(3) Law Rep. 20 Eq. 539, 540.
(4) Hetley, 35.
(5) 5 B. & Ad. 507.
(6) 3 App. Cas. 709.

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The authorities cited in the learned note to *Rex* v. *Inhabitants of Ferrybridge* (1) shew how custom or usage may alter the old law of waste as regards "seasonable woods." And in *Brook* v. *Cobb* (2), Lord *Coke* said that felling oaks of an age beyond that at which they could be cut as underwood was not waste "if the use of the parties be to fell such for seasonable wood."

[KAY, L.J.:—You say it is the usage or custom of the country to cut this timber; but the question is whether it is according to usage or custom for a limited owner to do this. You must shew that his doing so is not waste.]

The usage or custom is proved to be invariable. All we have to shew is what is the usage or custom in the woods, not what is the usage or custom of the tenant for life or any other limited owner. In all the cases the pleadings go only to the particular custom; custom or no custom being the only question. In pleading the custom, it is not usual or necessary to plead also that the person cutting the timber is a limited owner not impeachable for waste.

[BOWEN, L.J.:—When a tree has once become timber can it be treated as timber not subject to waste?]

That depends on the question whether custom takes away from it the character of timber and calls it a "seasonable" tree. Here the evidence shews that the custom and practice of treating timber in the beech woods as seasonable wood has long existed on the countryside.

[KAY, L.J.:—When once a tree has become timber is it possible to establish a custom to destroy it?]

By custom it may be cut down, notwithstanding that it is a timber tree; and in a beech wood timber may become seasonable trees, and thus either cease to be timber or lose some of the properties of timber.

With regard to *silva cædua*, it means every kind of tree that, if cut, will grow again: Year Book, 50 Ed. 3 (3); 1 *Eagle* and *Young's* Tithe Cases (4). It is an ecclesiastical term, and has never

(1) 1 B. & C. 375, 379, *et seq.*
(2) Brownlow and Gouldsb., Pt. 2, p. 150.
(3) Page 10.
(4) Page 26.

passed into the common law: 1 *Gibson's Codex* (1); *Evans* v. *Rowe* (2). It is said that the authorities in our favour are cases of coppice; but there is no distinction founded on coppice: *Evans* v. *Rowe*. In *Evans* v. *Rowe*, for the purpose of ascertaining what timber was titheable, a distinction was taken between trees grown from seed, and trees springing from their own stools, and it was held that trees of the latter description were alone titheable, although they might be of more than twenty years' growth. But that case, and also *Bibye* v. *Huxley* (3), to the same effect, is discussed in 1 *Eagle* on Tithes (4), where it is argued that in questions of waste no distinction has ever been made between timber trees with reference to their mode of growth, and that timber trees growing from stools have all the natural and legal qualities of timber trees in general; and the reasoning of the writer was followed in *Lozon* v. *Pryse* (5).

We rely in the present case on the analogy of open mines. Under the law relating to open mines, the produce of such mines forms part of the profits of the land, and as such belongs to the person in possession: *Elias* v. *Snowdon Slate Quarries Company* (6).

If trees standing separately by themselves are felled by a tenant for life, that would be waste; but where trees are standing in a wood, and they are felled in due course of management for the benefit and preservation of the estate, the trees so felled become part of the rents and profits, and so belong to the tenant for life: *Bateman* v. *Hotchkin* (7); *Kekewich* v. *Marker* (8); *Bagot* v. *Bagot* (9); *Earl Cowley* v. *Wellesley* (10); *Honywood* v. *Honywood* (11).

[BOWEN, L.J., referred to *Ford* v. *Racster* (12).]

R. F. Norton, for the trustees of the will, referred to the *Settled Land Act*, 1882, ss. 2 (sub-s. 8), 35, and 58; and *In re Duke of Marlborough's Settlement* (13).

(1) Page 669.
(2) M'Cl. & Y. 587, 589, 590.
(3) 1 Eagle & Y. 805.
(4) Pages 233, *et seq.*
(5) 4 My. & Cr. 600.
(6) 4 App. Cas. 454.
(7) 31 Beav. 486.
(8) 3 Mac. & G. 311.
(9) 32 Beav. 509, 517.
(10) 35 Beav. 635; Law Rep. 1 Eq. 656.
(11) Law Rep. 18 Eq. 310.
(12) 4 M. & S. 130.
(13) 32 Ch. D. 1, 10.

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Sir *H. Davey*, in reply:—

No authority has been produced to contradict the proposition that a limited owner impeachable for waste is not entitled to cut and sell timber and appropriate the proceeds to his own use. The only possible exception—and this is a doubtful one—is, according to Lord *Romilly* in *Bagot* v. *Bagot* (1) and *Earl Cowley* v. *Wellesley* (2), where timber trees are growing in a coppice which is regularly cut as a coppice. Whether that exception is sound or not is immaterial, because in the present case the trees cut were maiden trees.

It is said that this has been ameliorating waste; but the destruction of timber and appropriation of the proceeds by a tenant for life is not ameliorating waste, even where the destruction has taken place for the benefit of other timber; and it is directly contrary to the principle of cases like *Tooker* v. *Annesley* (3). Again, custom or usage has been relied upon; but no custom, unless immemorial, can overrule the common law with regard to the rights of limited owners; and there is no sufficient evidence here of any usage permitting a limited owner of the estate to cut timber and appropriate the proceeds whenever in his opinion the cutting is necessary for the growth of the young timber. There is, no doubt, a proper method of managing a timber estate; but no course of management can be permitted to alter the relative rights of tenant for life and remainderman; and it has never been held that, where a limited owner has permitted a tree to grow for more than twenty years and to become timber, he can cut it down, sell it, and appropriate the proceeds.

1891. July 8. LINDLEY, L.J.:—

This is an action brought by the tenant for life and remainderman of certain estates in *Buckinghamshire* and *Oxfordshire*, principally against the executors of Lady *Dashwood*, the late tenant for life, her title, as well as that of the Plaintiffs, being derived under the will of her husband, Sir *George Henry Dashwood*, who died in 1862. He was tenant in fee simple in posses-

(1) 32 Beav. 509.
(2) 35 Beav. 635; Law Rep. 1 Eq. 656.
(3) 5 Sim. 235.

sion of these estates. By his will he created a term in the *West Wycombe* estate, which determined on her death. Under the trusts of this term she was entitled, during her life, to the residue of the rents and profits of the estate, after paying certain annuities. She was also entitled to reside at, and had the use and enjoyment of, the mansion-house and the grounds usually in hand. The will empowered her, with the consent of the trustees, to sell such timber, not being ornamental timber, on any part of the estate as should be necessary for the purpose of repairing the mansion-house, outbuildings, park, grounds, fences, gates, and appurtenances. There was no special provision as to the beech woods. The action is brought, substantially, against her executors, to make them accountable for the proceeds of these beech woods, which the Plaintiffs say were wrongfully cut. Mr. Justice *Chitty* decided against the Plaintiffs and in favour of the Defendants, and the Plaintiffs have appealed.

Laying aside all custom, whether ancient or modern, this action would fail, for the tenant for life would have done nothing wrong; she cut beech in the ordinary course of good forestry, and, apart from custom, that was not waste.

As regards the beech woods in *Oxfordshire*, where beech trees are not timber, this is admitted to be true. But as regards the beech woods in *Buckinghamshire*, where beech is timber, the case is said to be different. The testator made no distinction between his estates in the one county and those in the other; he gave the rents and profits of both alike to Lady *Dashwood* for life, with power to cut timber for repairs; but yet it is contended that, although she was entitled to cut and sell beech trees in those parts of the estates which were in *Oxfordshire*, she was not entitled to do the same with beech trees on those parts of the estates which were in *Buckinghamshire*. Such a conclusion would, I think, startle the testator, and would be to defeat, and not carry out, his intentions as expressed in his will.

It is contended by the Appellants that, beech being timber by custom in *Buckinghamshire*, cutting it, even in the ordinary course of good forestry, is necessarily waste and actionable.

This argument is based upon two assumptions, viz.: first, upon the assumption that the question of waste or no waste is an

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abstract question, and does not in any way depend on the intention of those who create the relation of landlord and tenant, or of tenant for life and remainderman, with reference to which alone the question can ever arise; and secondly, upon the assumption that, although it is right to admit evidence to shew that beech is timber by custom, it is wrong to admit evidence to shew that by usage in a particular locality it is not regarded as waste to cut it. In other words, the argument is based on the assumption that evidence may be, and indeed must be, admitted to prove the custom which makes beech timber; but that evidence is not admissible to prove a usage with reference to which parties may have contracted, or have made testamentary or other dispositions of their property. These assumptions are, in my opinion, inadmissible. If by immemorial custom beech is timber, but if there is also a well-established usage that limited owners cut it in certain cases according to well-recognised rules, I cannot conceive upon what principle such usage is to be ignored when considering the intentions of persons dealing with property on which both the custom and the usage prevail. There is nothing unreasonable in paying attention to both. The custom is not rendered uncertain nor repugnant. The custom simply makes beech "timber" in the common law acceptation of the term; but the applicability of the custom, like the applicability of the common law to a particular case, will still depend on the intention of the parties concerned; and where that intention is a matter of inference, usage becomes all-important. Beech may be timber for some purposes, but not for all. It may be timber for rating purposes, or for tithing purposes, and when not cut according to the intention of a grantor, settlor, testator, or other disposer of property, beech is timber for the purposes of waste also. If it is said that this is to make beech timber, and yet not timber, the answer is that whether in any particular case it is to be treated as timber between tenant for life and remainderman depends on the true construction of the document which creates the relation between them.

Further, if it is said that there cannot be a custom to commit waste, the answer is that there may be a usage which renders that not waste as between persons claiming under a particular

instrument framed with reference to the usage which would be waste as between other persons.

It is, however, urged that this point is covered by authority and has been decided in favour of the Appellants in *Aubrey* v. *Fisher* (1). Language is, no doubt, to be found in the judgment of Lord *Ellenborough* in that case, which, if the above considerations are lost sight of, may appear to support this contention. But I cannot regard the case as deciding that in such a case as this evidence of usage is inadmissible. The question there was whether in *Buckinghamshire* beech was rateable to the poor as "*saleable* underwood" within the statute 43 Eliz. c. 2, s. 1. There was no question between tenant for life and remainderman. The evidence as to the management of beech woods was very similar to that adduced in this case; and upon that evidence it was perfectly plain that beech trees were not "saleable underwood"; in fact, they were not underwood at all. This entitled the plaintiff to a verdict; the jury found in his favour, and the Court refused a new trial. So far the case is simple enough. But the defendant in *Aubrey* v. *Fisher* contended that by custom beech trees, however old, were not timber unless they contained ten cubic feet of solid wood; and that whatever trees were not timber must necessarily be underwood. The defendant had not raised any such point by his pleadings; on the contrary, he had simply taken issue on the plaintiff's allegation that beech in *Buckinghamshire* was timber; and Lord *Ellenborough's* observations had reference to this state of the pleadings. He, moreover, pointed out that the evidence did not support the contention that old trees with less than ten feet of solid wood were underwood. The other Judges were clear that beech trees more than twenty years old, and not grown and cut as underwood, were not "saleable underwood." Evidence to shew that some of them were not timber would not make them "saleable underwood." The classification of trees into "timber" and "saleable underwood" is not exhaustive. There are many trees indigenous to this country, and which are neither one nor the other; as, for example, sycamore, hornbeam, wild cherry, alder, beech, birch, &c. And numbers of trees have been introduced, and are now common,

(1) 10 East, 446.

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to which the same observation applies. Nor is it true that trees which would be timber if let alone may not be so cultivated and dealt with as to be saleable underwood, even though more than twenty years old: see *Lord Fitzhardinge* v. *Pritchett* (1). It is plain, therefore, that the evidence relied upon by the defendant in *Aubrey* v. *Fisher* (2) could not have affected the result, even if a new trial had been directed. Having regard, therefore, to the pleadings and to the above consideration, I cannot accept *Aubrey* v. *Fisher* as an authority for the proposition that, simply because beech trees are timber by custom in *Buckinghamshire*, it cannot also be shewn to be the constant practice for owners to cut them according to certain well-known rules and to sell them for their own benefit; nor can I regard the case as any authority for excluding evidence of such a usage in considering the rights of persons claiming under a disposition of property situate in a district where such practice prevails.

The testator's will contains a clause expressly empowering the tenant for life (with the consent of the trustees) to fell such timber as may be necessary for the purpose of repair; and it was contended that this shews that it was not intended that the tenant for life should fell timber for any other purpose. But, in answer to this argument, it is to be observed that the power extends to the whole of the estates, and is not confined to those in *Buckinghamshire*. Moreover, it is common knowledge that beech is not fit for many sorts of repairs; it is only fit for inferior kinds of work; and the clause authorizes the cutting of better timber, such as oak. Under these circumstances, I cannot regard the insertion of this clause as indicating an intention that the tenant for life should not be at liberty to cut and sell beech trees in *Buckinghamshire* according to the alleged usage, if it be proved to exist.

It was decided in *Tucker* v. *Linger* (3) that a modern usage in *Kent*, whereby a tenant could remove and sell flints turned up in the ordinary course of ploughing, was good, and was applicable to the case of a tenant holding under an agreement which reserved all minerals to the lessor and which prohibited the tenant

(1) Law Rep. 2 Q. B. 135. (2) 10 East, 446.
(3) 8 App. Cas. 508; 21 Ch. D. 18.

from committing waste. That case shews that, if the usage relied upon by the Defendants is proved, there is no reason why, in point of law, it should not prevail in the present case. The reason which renders evidence of usage admissible in considering the rights of a lessor and lessee under an agreement or a lease is, that they naturally contract with reference to the usage. So, if a man has property in a country where there is a well-known course of cultivation, and he specifically grants or devises such property, he naturally does so upon the assumption that the well-known usages of the district will be observed by those to whom he gives the property; and I take it to be clear that evidence of such a usage can no more be excluded in construing a will expressly devising such property than in construing a lease of it. The admissibility of such evidence is warranted by the fifth proposition enunciated and illustrated by the late Vice-Chancellor *Wigram* in his admirable Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills (1); and the fifth example (2) given in that book is so important that I will read it. He says: "It is upon the principle before adverted to, namely that all writings tacitly refer to the existing circumstances under which they are made, that Courts of Law admit evidence of particular customs and usages in aid of the interpretation of written instruments—whether ancient or modern—whenever, from the nature of the case, a knowledge of such customs and usages is necessary to a right understanding of the instrument. The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." Then he cites very many authorities illustrating that proposition.

Now, as to the evidence, I have read it all carefully, and, without alluding to it in detail, I consider it proved, first, that beech trees are timber in *Buckinghamshire*; secondly, that in the ordinary course of good forestry beech woods ought to be treated very differently from other woods, and that from time to time the large trees ought to be taken out so as to promote the growth of younger trees and ensure a succession of good timber; thirdly, that it is the universal practice, in that part of *Buckinghamshire*

(1) 4th Ed. p. 65. (2) Page 86.

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in which these estates are, for the owners of beech woods to act on this principle, and that the beech woods on these estates have been managed accordingly for many years; fourthly, that beech trees so treated are regarded as crops; fifthly, that the proceeds of their sale are regarded as income, and not capital; and, lastly, that no distinction is known to the witnesses between owners in fee and limited owners in these respects, although in leases it is usual to except timber and beech woods and to reserve the right of cutting them to the lessors. It is, I think, incredible that, if the usage did not extend to tenants for life, the witnesses would not have known such to be the case. I infer, therefore, that the usage is general and applies to tenants for life, although not expressly made unimpeachable for waste. I do not think the usage immemorial, although I infer that it is as old as the cultivation of beech woods. The mode of managing beech woods is based on the nature of beech, and the usage in this particular locality has arisen from the quantity of beech and from the trade which has sprung up in consequence of its existence in large quantities; and it is obvious from the evidence that the large part of the ordinary rents and profits of these estates, and of others in the neighbourhood, is derived from the felling of trees in the beech woods upon them according to the usage proved. Any person entitled to the rents and profits of these estates would, therefore, presumably be entitled to the proceeds of beech trees felled according to the usage. At least, that inference may be fairly drawn in the absence of all evidence to the contrary, and it is the inference which I draw from the evidence as it stands. The testator in this case always managed his beech woods in the way described, and must be taken to have known of the usage, and to have made his will with reference to it. To exclude evidence of such a well-known local usage or to disregard it in construing his will would, in my judgment, be a great mistake.

Taking this view of the case, it becomes unnecessary to consider the numerous old and modern authorities which were referred to in the course of the argument. I will only say that I have examined them with care; that the decisions on *silva cædua* and tithes, including *Lozon* v. *Pryse* (1), do not throw much

(1) 4 My. & Cr. 600.

light on the point for decision; and that I can find no authority for saying that it is ever waste to cultivate land or to cut and dispose of timber according to a prevailing local usage, unless such usage is excluded by the terms of the instrument creating the limited estates which alone give rise to the question. *Brooke's* Abridgment, "Waste" (1), *Tucker* v. *Linger* (2), *Doe* v. *Earl of Burlington* (3), and *Jones* v. *Chappell* (4), go far to shew that such cannot be the law.

It is unnecessary to consider whether what Sir *George Jessel* said about timber estates in *Honywood* v. *Honywood* (5) is or is not too general. If his observations are confined to estates the trees on which, though timber, may by virtue of a local usage be cut periodically when grown in woods with a view to ensure a succession of timber and to preserve such woods, I see no reason to dissent from him; but if he intended to go further, he may have gone too far. Be this as it may, what we have to deal with here is an estate in a locality in which such a usage is proved to exist.

The ordinary law of waste is, therefore, I think, not applicable as between the persons claiming under the will with which we have to deal. In other words the cutting of beech woods according to the usage was not waste in the contemplation of this testator; and, it not being waste, the Plaintiffs cannot claim the proceeds of their sale.

I ought to add, that the usage on which I base my judgment is confined to beech, and does not extend to oak trees growing in beech woods. This action is really brought in order to establish the Plaintiffs' right to the proceeds of sale of beech, and the appeal is from the decision on this point. If Lady *Dashwood* cut oak trees in beech woods improperly, no point was made of that as a distinct cause of action nor as a ground of appeal. It is unnecessary, therefore, to consider the important passage in *Brooke's* Abridgment, "Waste" (6), which is relied upon as adverse to the Plaintiffs, even as regards the oaks so cut. The quantity of oaks cut was, I suppose, not worth litigation, and they may have been

(1) Pl. 134.
(2) 8 App. Cas. 508.
(3) 5 B. & Ad. 507.
(4) Law Rep. 20 Eq. 539.
(5) Ibid. 18 Eq. 306.
(6) Pl. 136.

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cut for repairs; and even if an account of these oaks were directed, the bulk of the costs of the action ought still to fall on the Plaintiffs.

In my opinion the appeal ought to be dismissed.

BOWEN, L.J.:—

The general law of waste as regards timber, and the ordinary restrictions upon the rights of limited owners impeachable for waste to cut timber, are perfectly clear and well established. The only question that requires elaboration is whether there exists a distinction under that general law in respect of certain kinds of timber plantations, and, if so, whether such distinction governs the present case. That beech by the custom of *Buckinghamshire* is timber, is not and cannot be denied. A faint attempt was made by the counsel for the executors of Lady *Dashwood* to suggest that her cuttings were justified by an ancient and immemorial custom, dating from beyond the period of legal memory, the effect of which would be either to except from the category of timber trees felled under such circumstances as the present, or else to modify the general law of waste to that extent. In spite of the argument addressed to us for which *Aubrey* v. *Fisher* (1) has been cited, and apart from questions of pleading or variance at *nisi prius*, I see no reason at all in law why ancient local custom might not modify either the *Buckinghamshire* customs as to beech, or the general law of waste as applicable to trees. But the evidence before us scarcely amounts to proof of ancient and immemorial custom, although modern usage is established of long standing. The justification of Lady *Dashwood's* cuttings seems, therefore, mainly to depend on the approximate correctness of the statement adopted by the late Master of the Rolls in *Honywood* v. *Honywood* (2) in a passage which is as follows (3): "Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates, that is,

(1) 10 East, 446. (2) Law Rep. 18 Eq. 306.
(3) Law Rep. 18 Eq. 309.

estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life."

The arguments addressed to us on the part of the Appellants were principally based upon the fact that timber has always been considered as a part of the inheritance. Obscure *dicta* were cited upon the other hand by the Respondents' counsel, from the Year Books (of which an example will be found in 11 Hen. 6 (1)), as to the usages in woody countries in respect of grand oaks of the age of twenty years and under, and to the effect that what is waste in an agricultural is not waste necessarily in a woody district; as also an anonymous decision in the reign of Queen *Elizabeth* (2). Like the other members of the Court, I have examined carefully the older authorities, both in the Year Books and the various Abridgments, most of which are epitomised in a note to *Rex* v. *Inhabitants of Ferrybridge* (3). It is sufficient for the purposes of to-day to state that no reliance in the judgment I am delivering is placed upon any of them, and I doubt whether they throw any light upon the matter before us. It is probably true that ancient and immemorial custom in some places has affected the law of waste—as, for instance, with respect to the precise age at which timber-like trees pass into the category of mature timber—but the cases cited scarcely go further than this, and one cannot expect to find precedents in old books for the precise fellings of timber which have taken place in Lady *Dashwood's* lifetime under a comparatively modern system of cultivation. Nor do the authorities on tithes and saleable underwoods really assist us. The earlier law contains no precise trace of the exception which is referred to in *Honywood* v.

(1) Page 1. (2) Godb. 4.

(3) 1 B. & C. 379.

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Honywood (1), although it is clear that the law of waste regards substance rather than technicality, and requires an act to be appreciably injurious to the inheritance before it condemns it as waste.

The nearest analogy which can be invoked to assist the case of Lady *Dashwood's* executors is to be found in the law applicable to grants of minerals, which is recognised in regard to mines, quarries, clay pits, sand, gravel, and bog earth. Under certain circumstances, the consumption of a part of the inheritance is not held to be waste. Cases in which the usufructuary is allowed to treat minerals as annual fruits or produce of the soil are common to ancient and modern jurisprudence. The open mine is an instance, beginning in the Roman, but familiar already to the English law as far back as the reign of *Edward* III. It is important, however, to observe that the open mine does not constitute an arbitrary exception to real property law. It is merely an instance of the application of a well-known principle of construction in virtue of which grants of mineral land are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor. The grantor was absolute master of his property, and could carve the lands which were the subject of his grant into such estates and interests as he pleased. It is therefore from his presumed will and intention that the result in the case of the open mine follows. The case of the open mine, in other words, is not an anomalous paradox which is to be found crystallized and embedded in the law of real property, but only an illustration of the mode in which the law gives a reasonable effect to the general language of a grant, even though the result is to allow the inheritance to be consumed by a limited owner. In Roman law it was only one of the several cases in which minerals might be consumed by the usufructuary: "*Et auri et argenti et sulpuris et æris et ferri et ceterorum fodinas vel quas pater familias instituit exercere poterit vel ipse instituere, si nihil agriculturæ nocebit*" (2).

Nor is the limited owner's privilege of working the minerals confined in English law to open mines; it extends also to such mines as are expressly mentioned in the grant or the demise.

(1) Law Rep. 18 Eq. 306. (2) Dig. Lib. vii., tit. 1, pl. 13 (5).

The reason of the doctrine is given in *Sander's Case* (1), that "inasmuch as the mine is open at the time, &c., and he (the lessor) leases all the land, it shall be intended that his intent is as general as his lease is: *scil.*, that he shall take the profit of all the land, and by consequence of the mine in it." In *Viner* v. *Vaughan* (2), Lord *Langdale* thus expounds the principle: "On the general law there is no controversy: a tenant for life has no right to take the substance of the estate, by opening mines or clay pits; but he has a right to continue the working of mines and clay pits where the author of the gift has previously done it; and for this reason, that the author of the gift has made them part of the profits of the land." In an earlier case, the *Countess of Plymouth* v. *Archer* (3), Lord *Thurlow* lays it down that if a mine is already open the working of it is part of the annual profits, and the minerals are not then held to be part of the inheritance. "There has been introduced into the law," says Lord *Watson* in *Campbell* v. *Wardlaw* (4), "this qualification, that if the owner of the soil, the fiar, creates a mineral estate by working or letting a particular seam of minerals he thereby brings the proceeds of the minerals so worked or let within the category of fruits, and within the right of usufruct."

A similar reasoning has been applied in *Ireland* to demises of bog earth. It was held in *Coppinger* v. *Gubbins* (5) that a tenant may have a right to cut and sell turf when bog which has been previously cut for sale is demised as bog, or where there is no other mode of enjoying the bog which it appears that the grantor intended should be enjoyed. The latter branch of the proposition furnishes us with the tests to be applied. It must be shewn, in the first place, that the grantor intended this particular portion of the subject-matter to be enjoyed. Next, it must be proved that there is no other reasonable mode of enjoying it than by treating the produce of it as fruits and profits of the estate. It is not waste to consume a portion of the inheritance, when the portion in question is evidently intended to be enjoyed

(1) 5 Rep. 12a.
(2) 2 Beav. 466, 469.
(3) 1 Bro. C. C. 159.
(4) 8 App. Cas. 650.
(5) 3 J. & Lat. 397.

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and cannot reasonably be enjoyed otherwise than through such consumption.

Is there any reason against adopting this known principle in the case of timber plantations, if a fit case occurs for its adoption? Can any difference be discerned between minerals and trees which precludes the possibility of our finding in the history and character of a timber plantation safe and certain indications of a testator's intention as to its enjoyment? We were told in argument that "timber estate" can never be defined. Strictly speaking, it is not the term "timber estate" which requires to be defined. "Timber estate" is, in fact, only a compendious expression, like the "mineral estate" mentioned by Lord *Watson* in *Campbell* v. *Wardlaw* (1).

The absence of authority in the early English law for the extension to timber plantations of the principle in question is, however, a matter on which the Appellants are entitled to lay stress. But the Year Books and the older Abridgments are not likely to furnish illustrations in which legal principles are applied to a comparatively modern system of arboriculture. Mining and quarrying have come down to us from the remotest ages; but the culture and periodical croppings of trees such as that proved in the case before us are the growth of a later period altogether. Occasion to invoke the principle for the benefit of grantees of "timber estates" arises only in a time when woods are cultivated on the plan of annual croppings, and when to treat them otherwise would be to destroy the revenue of a property and to paralyse its management. In a case which is necessarily novel it is desirable to refer to the law of usufruct, on which the English law of waste is, to a great extent, based.

The Roman law forbids in general language the cutting of timber trees: "*Si grandes arbores essent, non posse eas cædere*" (2). The distinction between *silva cædua* and *silva non-cædua* is well known, and *silva cædua*, as a rule, was equivalent to coppice "*quæ succisa rursus ex stirpibus aut radicibus renascitur*" (3), a meaning which found its way through the Ecclesiastical Law into the law of tithes and the English statutes dealing with

(1) 8 App. Cas. 650. (2) Dig. Lib. vii. tit. 1, ss. 9, 11.
(3) Dig. Lib. l. tit. 16, s. 30.

tithes. The citation from the rescript of *Hadrian* (1), which alludes in general terms to the rights of cutting possessed by the usufructuary of a wood, probably relates to *silva cædua* only. But the Digest, so far as it treats of usufruct, is concerned mainly with the ordinary Roman farm or landed estate, of which coppice or *silva cædua* was a common adjunct, and the prohibition of the cutting of great trees which I have mentioned is primarily referable to such ordinary property. Roman forests were, beyond all question, the subject of revenue, both to the State, which farmed them continually, and to private individuals; and though there is no special allusion in the Digest to such cases, it is impossible to study the Roman law of usufruct without feeling convinced that had the periodical croppings of big trees ever been a necessary part of their management and enjoyment, the law of usufruct would have sanctioned and compelled a distinction to be made in favour of their usufructuary. The Digest contains a wider definition of the term "*silva cædua*," and one of authority equal to that which identifies *silva cædua* with coppice. It is a definition that comes to us from *Gaius*, and it certainly affords some justification for the description of the "timber estates" which we owe to the late Master of the Rolls in *Honywood* v. *Honywood* (2): "'*Silva cædua*' *est, ut quidam putant, quæ in hoc habetur, ut cæderetur*" (3). It is upon the interpretation of this latter text, as read by the light of the general law of usufruct, that modern commentators base a right in the usufructuary to cut such plantations as are expressly cultivated for periodical felling and sale. (See *Valgerow, Pandekten* (4); *Sintenis, Civilrecht* (5), summarising an essay of *Laspeyre's Archiv für die civilistische Praxis* (6); and *Roby's Justinian* (7).) Even in the days of *Voet* (8) such a practice of felling timber trees at regular periods was considered to be well justified, when in conformity with the usages of the neighbourhood and the practice of the surrounding proprietors. The law of *France* followed in former times the strict prohibition of the Digest as to cutting

(1) Dig. Lib. vii. tit. 8, s. 22.
(2) Law Rep. 18 Eq. 306.
(3) Dig. Lib. tit. 16, s. 30.
(4) Page 735.
(5) Page 59.
(6) Vol. xix. pp. 71–113.
(7) Page 77.
(8) Lib. vii. tit. 1, pl. 22.

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great trees: *Pothier, du Douaire* (1). But during the last century exceptions arose in *France* in regard to the periodical felling of cultivated woods. (See *Demolombe, Traité de la Distinction des Biens* (2); *Nouveau Denizart* (3).) Finally, the *Code Napoléon* (4) has provided that the usufructuary may cut timber in plantations that are laid out for cutting, and are cut at regular intervals, although the usufructuary is bound to follow the example of former proprietors as to quantity and times.

We have been told that to apply to timber the doctrine which has been adopted in the case of minerals will be to transfer it to a subject-matter where no line can be drawn as marked and as unmistakable as the line presented always by the open mine. But it is not a valid objection to a legal doctrine that it will not be always easy to know whether the doctrine is to be applied in a particular case. The law has to face such embarrassments. Nor must it be forgotten that the principle in question never becomes applicable unless it is absolutely needed for the purpose of giving a reasonable effect to a grantor's grant or a testator's will. To apply it where such necessity is clearly established is not to introduce laxity into the law of real property. The first question must still always be, whether the consumption of the particular part of the inheritance under discussion is necessary for its reasonable enjoyment. The second question will then arise, namely, whether in any reasonable view of the circumstances of the case, the grantor must have intended such particular portion of the inheritance to be reasonably enjoyed. For it will not necessarily follow that, because it seems advantageous to the inheritance to have timber felled, the grantor must therefore have intended its felling. Reasonable necessity of construction, not the prudent management of estates, lies at the bottom of the doctrine which we are considering. It has nothing to do with ameliorating waste. It may well be, in many cases, that the grantor has not intended the tenant for life or years to extract from the inheritance the fullest and most fruitful enjoyment of every portion of it—a distinction which is noticed, and

(1) No. 197.

(2) 4me éd., vol. ii. p. 337, 338; liv. iii. tit. iii. ch. i. pl. 405.

(3) T. ix., v° Fruits en matière civile, s. 2, No. 1.

(4) Code Civ. 591.

rightly noticed, in *Coppinger* v. *Gubbins* (1). The inquiry in the present case should therefore be whether it is a necessary implication from the subject-matter of the testator's will, that the particular woods under discussion were meant to be fully enjoyed as an annual source of revenue in the usual way by his widow. The fact that a restricted power to cut timber for repairs is given by the will to her trustees does not appear to be inconsistent with such a view. A power under limited circumstances to commit waste does not touch the point whether a special system of felling, as practised in particular woods, is waste at all, which is the problem we have to solve. Suppose that the testator had, in express terms, mentioned the timber plantations with which this appeal is concerned as plantations of which the tenant was to have the benefit and use. Could it then be successfully maintained that he did not by implication grant the power of felling all such trees as had been cultivated upon the system of periodical cropping? No other effect could be reasonably given to such an express mention of the woods. There is no such language to be discovered in his will: but what is the exact nature of the plantations and their history? The woods in question had from a date prior to the beginning of the present century been managed upon the system of annual felling, and while so treated had constituted an annual income to their owner of between £1500 and £2000 a year. They had been thus dealt with from beyond the time of living memory in accordance with a usage, so far as beech is concerned, long prevalent in those parts, where large beech woods and timber trees in such woods are farmed as farmers ordinarily cultivate their crops—a plan which not only secures a large and yearly pecuniary return, but, so far as the beech woods are concerned, is actually necessary to their nurture. Can it reasonably be supposed that the testator meant to paralyse the culture of his woods, which had been going on at the testator's death for between sixty and seventy years at least; to subvert the whole arrangement and system that had been followed by himself and his predecessors; to condemn to sterility a source of large annual profit; and to reduce the money value of his estate by little less than £2000 a year; and to do all this for no purpose

(1) 3 J. & Lat. 397.

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whatsoever, and with no advantage to the remaindermen that can be stated or imagined? It is said that the usage of the neighbourhood is not to be taken into account; that it throws no light on the intention of the testator or the language of his will. I am not at all prepared to accept this proposition, or to exclude usage from consideration any more than *Voet* in his day would seem to have excluded it. If, by the consistent practice of the surrounding district, some timber is always treated for the purposes of arboriculture as the annual fruit and profit of an estate, such usage might, I think, conceivably reflect light on the language of a will or grant, as well as on the language of a lease. I see no difference between illuminating from external and surrounding circumstances a document which contains a bequest, and illuminating by similar sources a document which contains a contract. But, putting this point aside for the moment, the usage prevalent in the country round is still useful, so far as regards beech trees, to shew that the past management of these woods, to which the testator was himself a party, and which must have been within his own cognisance, was a rational, deliberate, well-known course of arboriculture which a testator might well consider necessary in his own woods and assume would be continued there in the absence of directions to the contrary. But, apart from usage of the neighbourhood, it seems impossible to believe that the testator desired to fling away a portion of the profitable elements of his estate. He must, I think, have meant that they should be, and have assumed that they would be, utilized and enjoyed in the only way in which they could be reasonably enjoyed, namely, as fruits and profits of the soil.

The older law speaks, it is true, of shade and pannage as an apt method of enjoying a tree. But the older law which deals with trees and woods that have a value, even if only used for the purpose of sheltering or feeding cattle or animals, hardly disposes of a case such as the present. It seems unreasonable to say that the testator may possibly have contemplated, in reference to a source of large annual pecuniary revenue, that it should be converted for the first time since the year 1798 into a mere amenity, and enjoyed only as such—or utilized for the purposes of simple

shade or pannage; that he desired only that his widow's flocks might lie under the shade, and that she might feed her swine upon the acorns and the beech nuts if she chose to do so. He must have meant his woods to be enjoyed in the accustomed way, and to be cultivated as they have been cultivated all through the century.

The instance to which the legal principle is now for the first time adapted by this Court may be new, but the principle is old and sound; and the *English* law is expansive, and will apply old principles, if need requires it, to new contingencies. Just as, in *America*, the law of watercourses and of waste has modified itself to suit the circumstances of enormous rivers and wide tracts of uncultivated forest, so the *English* law accommodates itself to new forms of labour and new necessities of culture; it favours the profitable holding of land. In a case like the present, good sense borrows accordingly, as it seems to me, the doctrine which has hitherto found its most remarkable illustration in the instance of the open mine, and applies it to the more novel case of a timber plantation which is cultivated for periodical croppings, and which forms a substantial item of yearly revenue to the owner of the property.

I draw no distinction as to any timber which, though not beech, has been cut and cultivated in the same course of management and on the same principle; nor do I understand that it is suggested that the croppings of Lady *Dashwood* have gone beyond what is justified by the practice of former owners. If it had been otherwise, an enquiry would have been requisite; but, as it is, I am of opinion that the appeal must be dismissed with costs.

Kay, L.J.:—

Sir *George Henry Dashwood*, by his will in 1855, left his estate at *West Wycombe*, in the County of *Bucks*, subject to certain mortgages, to trustees for 100 years, if his wife Lady *Elizabeth*, his brother *John*, and his sister *Mary*, or any of them, should so long live, upon trust to pay a jointure of £600 a year to Lady *Dashwood*, and to pay the interest on the mortgages and certain annuities; and subject thereto, "Upon trust to pay the surplus

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or residue of the yearly rents and profits," to Lady *Dashwood* during her life for her separate use without power of anticipation, and to permit her to reside at the *Mansion House* at *West Wycombe:* and after the determination of the term he gave the estates to the use of his first son for life, with remainder to his first and other sons in tail male, and so in succession to his other sons and their issue and to his daughters' male issue, and to his nephews and other issue in strict settlement. The will expressly provided that the several limitations thereinbefore contained to the use of any person or persons for life should, as to the freehold estates, be without impeachment of waste. It also contained a direction that Lady *Dashwood,* and every other person entitled during the term of 100 years to the actual possession or to the receipt of the rents and profits of the estate, should keep the mansion, outbuildings, park, ground, fences, gates and appurtenances in good repair, and that it should be lawful for her and them, with the consent of the trustees, "to fell such timber (not being ornamental timber) on any part of my estates as shall be necessary for the purposes of such repair, or of the repair of any other houses, buildings, fences, gates and appurtenances, on any other parts of my said estates."

The testator died in 1862. Lady *Dashwood* survived him and took possession of the property and held it until her own death in 1889. The testator had no issue, and upon the death of Lady *Dashwood,* the Plaintiff, Sir *Edwin Abercromby Dashwood,* became tenant for life. His sons, should he have any, would be tenants in tail successively in remainder, but as he has no son, his younger brother, the Co-Plaintiff *Francis Dashwood,* who was born after the death of the testator, namely, in August 1863, was at his birth, and is now, tenant in tail male in remainder.

These two Plaintiffs have instituted this suit against the legal personal representatives of Lady *Dashwood* and the legal personal representatives of the trustees of the term of 100 years, who are all dead, seeking to make their respective estates jointly and severally liable for timber alleged to have been improperly cut by Lady *Dashwood.* The action is only pressed against the representatives of Lady *Dashwood.*

Under this will Lady *Dashwood* certainly had no power to

commit waste. She was equitable tenant for years determinable with her life, and had, therefore, only a chattel interest. The testator expressly declared that the persons to whom he gave life estates by way of use should not be impeachable for waste, but made no such declaration as to Lady *Dashwood*. On the contrary, he directed that she, with the consent of the trustees of the term, might cut such timber, not being ornamental, as should be necessary for repairs. In short, his will is that Lady *Dashwood* is to be impeachable for waste, except that she may take, with the trustees' consent, timber necessary for repairs.

In the county of *Bucks* beech is considered to be timber.

Upon this estate, the area of which I understand is about 4000 acres, there are about 1100 acres of woodland, principally beech, but also containing other timber, such as oak, ash, and elm. Beech will grow from the mast dropped from the trees, without artificial cultivation. When the older trees are cut away, and light and air are thus let into the wood, seedlings spring up, which, if properly thinned, grow in time to large trees.

A small portion of the woodland is in *Oxfordshire*, in which county beech is not timber, and no objection is made to such cutting as took place in this part of the wood.

The mode of managing woods in *Buckinghamshire*, according to the best forestry practised there, is described by one of the witnesses, Mr. *Oakley*. The woods are thinned at intervals varying from ten to fifteen years. Large heavy trees, and any crooked, misshapen or dying trees, are taken out, leaving those which are growing best in succession for the next cutting. Oak, ash, and elm are treated in the same way, although these do not plant themselves readily like beech. The trees with heavy heads are taken, which he calls umbrella trees, because they prevent the young saplings from growing and thriving by their shade and the drip from them. Lady *Dashwood* managed the woods in this way, taking, on an average, 620 loads a year, chiefly beech, but with some oak, ash, and elm. One hundred and eight loads of oak, 201 of ash, and sixty-five of elm, were taken by her in nine years, averaging eleven of oak, twenty-two of ash, and seven of elm every year, or about forty loads a year of ordinary timber.

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Five hundred loads are worth about £1600. After some deductions, it is said that her yearly income from this source was about £1700.

Now, that the will gave her power to do this, seems to me to be an impossible contention. If she had the right to cut £1700 worth of timber every year, including about forty loads of oak, ash, and elm, it would be superfluous and inconsistent to give her an express power to cut for repairs, and to limit that power by requiring the consent of the trustees. I can give no other meaning to the will of this testator than that Lady *Dashwood* was not to cut any timber except such as was wanted for repairs, and that only with the consent of the trustees.

A great deal has been said in argument for the Defendants about "custom"; but, in my opinion, the word has been strangely misused. A custom which controls the law of waste must be a custom to do that which would be waste but for the custom. Waste in law is destruction of a part of the inheritance by a limited owner, such as a tenant for life or years. The custom which would exonerate him from the consequences must be a custom for a limited owner to do the act in question without being subject to any legal liability.

Littleton, in sect. 169, states that "a custome used upon a certaine reasonable cause, depriveth the common law;" and in sect. 170, "and note, that no custome is to be allowed, but such custome as hath been used by title of prescription, that is to say, from time out of minde." *Coke's* Commentary confirms this statement of the law, quoting *Consuetudo præscripta et legitima vincit legem: Co. Litt.* (1).

But this must not be confounded with such customs or rather usages as are imported into commercial contracts, or into contracts between landlord and tenant, as in *Wigglesworth* v. *Dallison* (2). In that case an immemorial or prescriptive custom was pleaded; but other authorities have recognised that evidence of immemorial usage in such cases is not required: see *per* Mr. Justice *Blackburn* in *Crouch* v. *Credit Foncier of England* (3), and *Tucker* v. *Linger* (4). But such usage, however extensive, would

(1) Page 113 a.
(2) Doug. 201.
(3) Law Rep. 8 Q. B. 386.
(4) 21 Ch. D. 18; 8 App. Cas. 508.

not prevail against positive law, whether by statute or decision: *per* Chief Justice *Cockburn*, in *Goodwin* v. *Robarts* (1).

The custom or usage in all such cases is a custom or usage between landlord and tenant, or, in other contracts, between persons in the same relative position as the contracting parties.

The custom or usage relied on in the present case is one which would entirely alter the ordinary common law of waste as applicable to this estate, and would enable the tenant for years, who is made impeachable of waste, to commit waste, notwithstanding the infirmity of her estate in that respect. It seems to me that, to produce that effect, it must at least be proved that from time immemorial such a limited owner, though impeachable of waste, has been accustomed to exercise the right so claimed.

In this case there is not the slightest evidence that any limited owner who was impeachable of waste ever attempted to exercise any such right, and the usage for the owners of the fee simple, or for limited owners who were not impeachable of waste, to manage the woods in the way which is complained of, cannot, as it seems to me, possibly justify a limited owner, who is impeachable of waste, in doing the same.

The utmost that the evidence amounts to is, that this mode of treating woods in *Buckinghamshire* is, according to good forestry, the best mode of making them profitable, and consequently the usual way of managing them by those who have the power to do so. If such evidence is sufficient, any tenant for life or years might defend himself in an action for waste by proving that what he had done was in the usual course of good management of the woods on the estate. But that is not the law. It has long been settled that where, in the course of good management, timber ought to be cut, the limited owner cannot take upon himself to cut it. If the remainderman is an infant, or non-existent, the tenant for life may obtain from the Court of Chancery a power of cutting timber upon the terms that the proceeds of it should be invested as capital and the income only treated as profits of the estate. One of the cases most commonly referred to on this subject is *Tooker* v. *Annesley* (2), where an inquiry was directed whether there were any and what

(1) Law Rep. 10 Ex. 357. (2) 5 Sim. 237.

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timber trees in the woods and plantations in a state of decay, and which would not improve by standing, or the standing of which would be prejudicial to the other trees, and which it would be for the benefit of all parties interested in the estate to have felled and sold: *Seton* on Decrees (1). But the same thing was done in 1790 by Lord *Thurlow* in *Mildmay* v. *Mildmay* (2)—though the propriety of so cutting before the estate of inheritance came into possession, was doubted by the Lords Commissioners in 1792—and again by Sir *W. Grant* in 1810, in *Delapole* v. *Delapole* (3), and in 1815 in *Wickham* v. *Wickham* (4), citing *Lewis* v. *Cray*, before Lord *Rosslyn* in 1798; and see, in 1820, *Attorney-General* v. *Duke of Marlborough* (5); and in 1842, *Tollemache* v. *Tollemache* (6).

It was argued, however, that the evidence establishes, not a custom for a limited owner so to cut timber, but a usage of management so universal in the county of *Bucks* that the testator must have intended that Lady *Dashwood* should continue it during her life.

There is no evidence that this usage is immemorial.

A usage, as I have shewn, though not immemorial, for farm tenants in a particular locality to cultivate their farms in a special manner, may be read into the contract between such a tenant and his landlord, (*a*) if not repugnant to anything in the contract, or (*b*) contrary to law as fixed by statute or decided cases.

This case differs in the following particulars:—

1. A devise of an estate to a limited owner is not a contract.

2. There is no evidence of a usage for limited owners impeachable of waste to cut timber in the manner which is in question.

3. To do so, if waste, is directly repugnant to the nature of the gift in this will.

4. It is a violation of the common law to say that a limited owner impeachable of waste may cut timber in this manner.

I know of no authority for reading a local usage into a will to

(1) 4th Ed. 1259.
(2) 4 Bro. C. C. 76, 78.
(3) 17 Ves. 150.
(4) 19 Ves. 419.
(5) 5 Madd. 280.
(6) 1 Hare, 456.

control the law of waste, as you may read it into a contract between landlord and tenant; and the only usage which can be read into such a contract is a usage for the tenant to do the act without the express consent of his landlord, not a usage for the landlord to do it when he is himself in occupation.

But the argument proves too much, and seems to me to refute itself. If it is right, by reason of a course of management not immemorial by an owner not impeachable of waste, to imply that a testator intended that an owner impeachable of waste under his will should do the same, then it follows that upon every devised estate an intention must be implied that such a limited owner may adopt the usual course of management by the testator.

Moreover, if this is to be the mode of construing, as to waste in timber, a will by which a limited owner is made impeachable of waste, the same rule of construction must apply to all other acts which the testator might have habitually done in the management of the estate, as, for instance, opening new mines or quarries every year, ploughing up so much ancient pasture, and converting it to other purposes, and the like. Of course, if this be the rule as to wills, it must apply to settlements also; and such a novel doctrine would effect a complete revolution in the common law doctrine of waste.

As Lady *Dashwood* was impeachable of waste, the only mode of resisting the claim against her seems to me to be to make out that this was not waste. That is in my opinion the real question. If this was not waste the testator's intention is immaterial. A testator cannot prevent a tenant for life from taking the ordinary rents and profits of that which he devises to him for life. An attempt to do so would be repugnant to the gift. If this be waste, the testator, as I read his will, has said that Lady *Dashwood* may not commit waste.

In *Honywood* v. *Honywood* (1) Sir *G. Jessel*, M.R., states the general law in words with which, as I quote them here, I entirely concur: "As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of

(1) Law Rep. 18 Eq. 306, 309.

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England; and, secondly, on the special custom of a locality. By the general law of *England*, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards. . . . . Timber, that is, the kind of tree which may be called timber, may be varied by local custom. . . . . Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down."

Now, the principal grounds upon which it was sought to make out that this cutting was not waste were, (1) that this is a "timber estate," and (2) that the wood cut by Lady *Dashwood* was "seasonable wood," which, according to ancient authority, may be cut by a limited owner.

First of all, what is a "timber estate"? Counsel for the Defendants disclaimed the definition that it means an estate upon which there is a good deal of timber. A timber estate, they say, is an estate upon which timber is cut periodically to allow a succession to grow up. That definition (unless by timber is meant wood of twenty years' growth and upwards) would include coppice, which, properly speaking, is oak, ash, or other wood cut at intervals of less than twenty years, so that it springs again from the same stool or stub; and the cutting of this at the proper periods by a limited owner is not waste.

But the definition is intended to go further and to include such cutting as has taken place here, namely, the cutting of large timber trees which do not grow again and are not individually cut periodically, but each of which is cut down once for all, and is replaced, not by a growth from the same stool, but by saplings springing up from the self-sown seed of the old trees. That is not coppice.

This definition of counsel does not agree with that of Sir *G. Jessel* in *Honywood* v. *Honywood* (1), which is the real foundation of the defence in this case, and of the decision of the learned Judge in the Court below. Sir *G. Jessel's* words are: "Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber

(1) Law Rep. 18 Eq. 309, 310.

estates, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber." And, in the case he was dealing with, the estate, he held, was not a timber estate.

Now, let me examine this definition. Oak, ash, and elm are timber. Beech, and perhaps some other trees, are so by custom in various localities. Literally, the estate described is one "cultivated merely for the produce of saleable timber." If that means that nothing else is cultivated on the estate there are few, if any, such estates in this country. But if not, how much of the estate must be so cultivated to make it a timber estate? It must be a considerable portion. If a property of 1000 acres had fifty acres only of woodland, it would be absurd to call the whole property a timber estate. If this novel limitation of the law of waste is to prevail, it is absolutely necessary to determine what is and what is not a timber estate. This shews at once the reason for the difference in the two definitions. Now, take the definition given by counsel in the present case. That seems to me also to present a serious difficulty. An estate may have been for 100 years or more in the hands of absolute owners, or a succession of limited owners not impeachable of waste. They may have managed the woods of timber upon it in this way. That, according to counsel's definition, would make it a timber estate, however small the proportion of woodland upon it might be. I cannot see any escape from the conclusion that every estate, the woodland upon which had been usually thinned periodically by cutting out timber trees according to the rules of good forestry, would come within this definition.

The difficulty of defining what is a timber estate is, in my

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opinion, a serious, if not fatal, objection to such a modification of the law. Another equally serious objection is that there is no reason for such an innovation. It is quite competent for a settlor to empower anyone to whom he gives a limited interest to deal with the timber in the usual way or in any way. The words "without impeachment of waste" would go further, but "without impeachment of waste for such cutting of woods as has been usual upon the estate," or some equivalent words, would give the limited owner just what is claimed in this case. In my opinion it is not expedient to alter the law of waste, even by Act of Parliament, still less by judicial decision, in order to give the limited owner this power when the settlor has refrained, and especially where, as in this case, he has designedly refrained, from doing so.

Sir *George Jessel* has pointed out in *Quilter* v. *Heatly* (1) and in *Ex parte Willey* (2), what I think every one must agree in—the inexpediency of deciding any case upon the authority of the *dicta* of modern Judges. There are old *dicta* of great Judges, which have been followed by many decisions and have become maxims of the law; but modern *dicta* are but attempts to embody in a short form the result of decisions or statutes which any lawyer can examine for himself. I proceed, therefore, to inquire upon what foundation does this *dictum* of the late Master of the Rolls rest. His Lordship states that it is an exception from the law of waste established principally by modern authorities. These authorities are before us. I believe that there is not one clear decision to support the *dictum*. It is impossible to suppose that there is any deliberate decision in modern times of a question of so much importance which has not been reported.

The first of the reported cases in 1845, *Ferrand* v. *Wilson* (3), which is the earliest cited in which the expression "timber estate" is used, was a case in which no question of waste was raised. A power to cut timber, and to pay debts and legacies with the proceeds, and to invest the surplus in purchase of land, had been given to trustees for a period which was practically unlimited, and the question which the Vice-Chancellor had to

(1) 23 Ch. D. 49. (2) 23 Ch. D. 127.
(3) 4 Hare, 344.

decide was whether this was not obnoxious to the law of perpetuity. For this purpose the Vice-Chancellor was considering whether, under the power of cutting given by the will, the proceeds of the timber were to be considered as rents and profits. If they were, the provisions would be illegal. In discussing this, the Vice-Chancellor speaks of a "timber estate," by which he seems to indicate an estate of which a purchaser or a lessee, with power to cut timber, would estimate the value by taking into consideration the annual falls of timber upon it as though these were usual profits of the estate. But there is not in his language the least intimation that the law would give to a limited owner of such an estate any larger power of cutting timber than it would upon any estate which was not a timber estate.

In the next case, in 1862, *Bateman* v. *Hotchkin* (1), timber had been blown down and some had been cut by a tenant for life impeachable of waste. The case is very shortly reported, but according to the report Lord *Romilly* is represented to have said that the tenant for life was entitled to have the benefit of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops. So far the judgment is not open to criticism. But then he is reported to have added, "There must be an inquiry to ascertain what part of the fund is derived from timber or cuttings within that description." The decree in that case, as given in *Seton* on Decrees (2), is in these words: "Let . . . . the defendant *H.* be allowed the benefit of the sale of all such trees felled by the wind which he would have been entitled to fell and cut himself, and to all proper thinnings, and all coppices which are periodically cut in the nature of crops, whether osiers, hazel, or oak." Then an inquiry, "what portion of the sum of £ received by the defendant *H.* derived from timber or cuttings of that description . . . . the defendant *H.* is entitled to."

That case is perfectly useless as an authority that the tenant for life is entitled to timber which has been taken as thinnings. The estate does not appear to have been a timber estate in any

(1) 31 Beav. 486. (2) 4th Ed. p. 187.

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sense; and it is quite obvious that all that was meant by the learned Judge was that the tenant for life was entitled to such thinnings as he might have made himself, which, in the case of timber-like trees, must have been trees under twenty years' growth. The use of the word "timber" in the inquiry, if it related to thinnings, must have been an error. A tenant for life is certainly not ordinarily entitled to thinnings of timber, that is, timber trees of twenty years' growth and upwards cut for the purpose of thinning a wood.

The next modern decision relied on was *Bagot* v. *Bagot* (1), in 1863, which was appealed (2), and compromised, with the approbation of the Lord Chancellor, upon the terms that the estate of the tenant for life, who had died, was made liable to repay the proceeds of timber and minerals in question, with interest from his death, and that so much as had arisen before the birth of the tenant in tail should be "invested and treated as part of the settled estate," and that so much as had arisen since his birth belonged to him absolutely. But reliance is placed upon the language of Lord *Romilly* (3), to the effect that it does not necessarily follow that all cutting of timber is waste: "In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, *i.e.*, every thirty-two or thirty-six years. This timber would, I apprehend, constitute the fair profits of the land to which the tenant for life would be entitled. So also, I apprehend, that proper and regular thinning of a wood, for the purpose of improving the rest of the trees within certain limits, would not amount to a waste. In one case, *Pidgeley* v. *Rawling* (4), Lord Justice *Knight Bruce* held, that the cutting of larch trees twenty years old, for this purpose, was legitimately done by the tenant for life, and did not amount to waste;" and he directed an inquiry which was to distinguish what parts of the timber felled were in the nature of thinnings, and what parts were properly felled with regard to the benefit of the estate.

Considering what was done upon appeal, the decision is of no importance, and the language which I have quoted is also dis-

(1) 32 Beav. 509.
(2) 33 L. J. (Ch.) 122, n.
(3) 32 Beav. 517.
(4) 2 Coll. 275.

credited for the same reason. Again, it does not appear that this was a timber estate. The *dictum* applies to all estates upon which there are woods of timber. It certainly is not the law that a limited owner can, for his own benefit, thin out timber woods which are twenty years old and upwards, however beneficial it might be to the estate that he should do so. The illustration given of thinning a wood of larch does not in any way support the *dictum*, because larch trees are not timber.

But the case most relied on is in 1866, *Earl Cowley* v. *Wellesley* (1). The decision was upon a special case stated on behalf of the tenant for life, who was impeachable of waste; and it is alleged that part of the real estate in *Hampshire* was 338 acres of woodland, on which were trees, principally oak and underwood, and the course of management was to cut twenty acres of the underwood of about twelve years' growth every year; and in the ensuing spring, where the underwood had been cleared, it was usual to cut down such trees as were likely to obstruct or prejudice the growth of those intended to be preserved, and which, having regard to the general improvement of the woods, should be cut down. The estate in question was vested in trustees, with directions to manage and "cut timber and underwood from time to time in the usual course," and, subject thereto, to hold upon trust for successive tenants for life, and the question was whether the proceeds of the cuttings, which the will expressly authorised the trustees to make, should go to the tenant for life. Where the cutting had taken place, as in part of the estate situate in *Wilts*, to improve the growth of the remaining trees, Lord *Romilly* declared the proceeds to be capital: where timber had been cut in the usual course of thinning, he held it should be treated as income, obviously meaning that was his construction of the trust in that particular will. "It appears," he said (2), "to have been cut in the usual and regular course as thinnings, and the produce is therefore income." The judgment is in a few words only; there is no reference to the property being a timber estate; and it seems to me impossible to treat this case as an authority that a limited owner is at liberty to cut timber—that is, oak, ash, and elm trees, more than twenty years old—because it has been usual

(1) 35 Beav. 635; Law Rep. 1 Eq. 656. (2) 35 Beav. 637.

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to thin the woods upon the estate by similar cuttings. Indeed, in *Honywood* v. *Honywood* (1), Sir *George Jessel* said that he had sent for the special case in *Earl Cowley* v. *Wellesley* (2), and it appeared that the thinnings on the *Wiltshire* estate were young plantations, and not properly timber at all.

In the argument in *Earl Cowley* v. *Wellesley* reliance was placed upon Lord *Eldon's* words in *Burges* v. *Lamb* (3), to the effect that it was Lord *Hardwicke's* opinion, in *Knight* v. *Duplessis* (4), "that it is not waste to cut timber where necessary for the growth of the underwood in which it is situated." According to the report, Lord *Hardwicke* did not say that such cutting was not waste, but just the contrary. His words are: "Timber growing among underwood must be cut down not to prejudice the underwood, that it may thrive, especially in an estate so near *London*, where underwood bears a great price: however it is too much for such a trustee to do, and there is no harm in granting an injunction to stay waste, which is submitted to." The will of the testator in that case provided that, until the testator's daughter attained twenty-one or married, her mother should receive the rents and profits, pay £300 a year to the daughter, take £900 a year herself, and account with the daughter if she attained twenty-one or married. If the daughter died sooner, the estate was devised to the plaintiffs. Lord *Hardwicke* restrained the mother from cutting the timber.

But reference was made in support of both propositions, particularly the latter which relates to seasonable wood, to the old books, and I proceed to examine the more ancient authorities. I have not found one in which a distinction is made, on the ground of waste, between one kind of estate and another, except that by custom in some places in woody countries, coppice and underwood—that is, wood which is cut at stated periods and allowed to grow again from the stools—may be so cut at intervals of twenty years, or longer.

One of the authorities relied on is an anonymous case in the Year Book, 11 Hen. 6 (5), where it was alleged that there had

(1) Law Rep. 18 Eq. 307.
(2) 35 Beav. 635; Law Rep. 1 Eq. 656.
(3) 16 Ves. 179.
(4) 2 Ves. Sen. 362.
(5) Page 1.

been a use "*de touttemps*" to cut all the wood growing in the wood in question at the age of twenty years and under, even where let for term of life, or years, and that this was considered seasonable wood; and it was said *obiter* by Mr. Justice *Martin* that, where there was great plenty of wood, oaks of that age were in some countries seasonable wood. But it is stated that all the Court were of opinion that if the oaks had passed the age of twenty years they were not seasonable wood. It seems quite certain that the wood in question in that case was oak coppice, because the allegation was that for all time it had been customary to cut down the whole wood every twenty years, or at shorter intervals; and again, because part of the complaint was that the wood had been left open, so that cattle had got in and eaten the germins, or young shoots that sprang up after the cutting: and the claim therefore was that, by immemorial custom, coppice—that is to say, wood which, being cut down, grows again from the same stools—may be cut at intervals of twenty years, although ordinarily oak of twenty years' growth is considered to be timber.

But in *Brooke's* Abridgement "Waste" (1), it is said that in the time of *Henry* VIII. it was totally denied that oaks of the age of twenty years, and under, may be cut by tenant for life or years, for they are of the nature of timber and may become timber, but by this way they can never grow to be timber. In the same page of *Brooke's* Abridgement (2), it is stated that it was held by *Bromley*, C.J., and *Hales*, J., that the cutting oaks of ten or eight years' growth is waste, for they might be timber hereafter, but that termor may take oaks, ashes, &c., which are seasonable wood, which have been used to be felled every twenty or sixteen, fourteen or twelve years. This is adopted in *Viner's* Abridgement "Waste" (3), where it is said that this must be by custom—that is, that the wood must be coppice which has been cut again and again in this manner. In pl. 7 it is said that oaks twenty years old cannot be said to be seasonable wood, and therefore it shall be waste to cut them. We were referred to *Rastell's* Entrées, dated in 1596, at p. 698 of

(1) Fol. 327, pl. 134. (2) Pl. 136.

(3) (E.) 6, n.

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which there is a form of plea given to the effect that oaks under twenty years of age, which it had been the custom to cut under that age from time immemorial, were seasonable wood.

If, as it seems to me, the meaning of the case in the Year Book was only this, that the wood in question was an oak coppice, that is to say, a wood which it had been the custom from time immemorial to cut down at intervals of twenty years, leaving it to grow again from the same stools, and if, in certain cases, by such immemorial custom the intervals of cutting coppice might even be longer, the law which relates to woods of that kind in no way authorizes the cutting down of timber trees which have not been usually cut so as to grow again from the old stools and are not coppice in any sense.

The case in *Godbolt* (1), 23 Eliz., shews that this was the well-settled law. That was a suit concerning underwood, which the owner, being at the time joint tenant, or tenant by entireties with his wife, with a limitation to his heirs, had allowed to grow twenty-five years, though the custom was to cut it every twenty-one years. It was decided that his widow, whom he had made tenant for life, could not cut that underwood. It was there repeated that in the wood countries they may fell seasonable wood, which is called *silva cædua*, at twenty-six, twenty-eight, or thirty years by the custom of the country, and so the usage makes the law in several countries. That again plainly refers to cases of coppice, and shews that seasonable wood and *silva cædua* have the same meaning, namely, coppice.

In *Rex* v. *Inhabitants of Ferrybridge* (2), there is a learned note dealing with some of the ancient cases and shewing that the expression "seasonable wood" meant the same thing as *silva cædua*, which, in 50 Edw. 3 (3), which I have examined, is thus explained: "By these words, '*silva cædua*,' is to be understood every manner of wood which can be cut down and will grow again." The word "seasonable," in fact, means that it is cut as it springs up from time to time, at certain seasons which are fixed by the custom of the country at longer or shorter intervals. And this law it was held in 1612, applied to oaks

(1) Page 5.

(2) 1 B. & C. 379.

(3) Page 10.

which had been allowed to grow past the usual time of cutting, and were of the growth of sixteen or twenty years, and for which tithes were paid. And it was there recognized that by particular custom the intervals of cutting might be twenty or twenty-four years: *Brook* v. *Cobb* (1).

In *Aubrey* v. *Fisher* (2), the question was whether certain beech trees which had been taken under a distress for Poor Rates under 43 Eliz. c. 2, were saleable underwoods within the meaning of that statute. The wood from which they were taken was in the county of *Bucks*. It was recognized that beech by the custom of that county was timber, and it was held by the Court that it must be taken to be subject to the rule of the Common Law that a timber-like tree becomes timber at twenty years' growth, and as the trees which were in question were more than that age, and had not been managed as underwood by cutting all down at stated periods leaving standard trees at certain distances, these timber trees could not be considered saleable underwood within the meaning of that statute.

The earlier cases on this question were examined in *Lord Fitzhardinge* v. *Pritchett* (3), where the question was whether woods were "saleable underwoods" so as to be rateable for the poor under 43 Eliz. c. 2, s. 19. *Mellor*, J., says: "Wherever the woods are treated, as in the present case, so as to raise successive crops from the same roots and stools, whether the crops ripen and are cut at an interval of ten, fifteen, or even thirty years, is immaterial; for the purpose of rating there is a succession of profitable crops, just as of any other crops, only the gathering is at longer intervals. . . . . Whether, therefore, the woods consist of oak, ash, or elm, which are universally timber trees, or of beech, which may be timber by custom, or willow, the stools of which can be and are so treated as to produce a succession of saleable crops, in such cases the woods are saleable underwoods;" and he points out that firs, and like trees, which do not spring again from the root, are not saleable underwoods.

Tithes were payable in respect of *silva cædua*, and what wood came under that description was from the earliest times the

(1) Brownlow & Goldesb. pt. 2, p. 150. (2) 10 East, 446.
(3) Law Rep. 2 Q. B. 135, 142.

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subject of contest with the ecclesiastical lawyers. It appears from the learned and elaborate judgment of Lord *Cottenham* in *Lozon* v. *Pryse* (1), that a provincial council held in 17 Edw. 3, under Archbishop *Stratford*, defined *silva cædua* to include wood of every description which, after the tree has been cut, grows from the stool or root. Obviously that definition is independent of the age of the wood, and accordingly, in 45 Edw. 3, an Act was passed authorizing a prohibition against a proceeding in the Spiritual Court to recover tithes of *gros bois*. Lord *Cottenham* shews that the clergy did not claim tithes from any wood except that which grew from stools, that is, coppice; and that this statute was expounded to mean that timber-like trees more than twenty years old, though grown from a stool, were not titheable. He says (2), "A copse growing, as it always does, from the stools of old trees, which is periodically cut, has nothing of the character of timber, and could not therefore acquire that character by being permitted to stand above twenty years. In *Cornwall* v. *Haws* (3), the wood was held liable to tithe, not because it grew upon stools, but because it was merely firewood, though of more than twenty years' growth. In such a case, all the germins are left to grow from the old stool; but if it be intended to raise a timber tree from such stool, one shoot only is permitted to stand, and the question is, whether such shoot, if deemed timber, be not privileged after twenty years' growth."

Reference was made in argument to the well-known exception to the law of waste in the case of open mines. A limited owner, though impeachable of waste, may continue for his own benefit the working of such mines. The analogy, if applicable, would go too far. It would follow that a limited owner in every case might cut timber in the same manner and to the same extent which the absolute owner or settlor had been in the habit of doing. The case of open mines is a well-established exception to the law of waste: *Co. Litt.* (4); *Campbell* v. *Wardlaw* (5); and there is no authority whatever for applying the same law to timber. There is no such thing known to the law as an open

(1) 4 My. & Cr. 604.
(2) Ibid. 612.
(3) 1 Sid. 300; 1 Lev. 189.
(4) Page 54 b.
(5) 8 App. Cas. 645.

wood in the sense of an open mine. Quarries which are open come within the same rule as open mines: *Elias* v. *Snowdon Slate Quarries Company* (1). There can be little doubt what is or what is not an open mine or quarry. But if the same doctrine were applied to woods it would occasion great difficulty. This is illustrated by an attempt which has been made to bring ground in *Ireland* which has been used for cutting turf for fuel within the rule. The attempt seems only to have been made as between landlord and tenant; and, as I have shewn, there is ample authority for treating a contract between landlord and tenant as governed by the usage of landlords and tenants in that respect in the locality. In an anonymous case (2), the Master of the Rolls in *Ireland* observed, "that where the soil and freehold of a bog has been demised as bog, or where all the land demised is bog and only valuable as such, the tenant may, in analogy to the right acquired by a demise of a coal mine, cut it as he pleases." But in *Jack* v. *Creed* (3), the Court of King's Bench in *Ireland* seems to have doubted even this to be law. In *Burrowes* v. *Hayes* (4) the Court of Exchequer in *Ireland* said that the observation in the anonymous case applied to where there was a demise of bog only, and refused to apply the same doctrine where the demise was of bog with land, because cutting turf should be distinctly authorized, as it was against "common right"; and the same was held in *Chatterton* v. *White* (5). These cases are referred to in an *obiter dictum* of Lord *St. Leonards* in *Coppinger* v. *Gubbins* (6).

Something was also said about ameliorating waste; and reference was made to the language of Chief Justice *Richardson* in *Barret* v. *Barret* (7): "The law will not allow that to be waste which is not any ways prejudicial to the inheritance"; a doctrine which was applied to prevent forfeiture of a copyhold, where the copyholder had pulled down a ruinous barn, an act which the jury found did not damage the property: *Doe* v. *Earl of Burlington* (8).

(1) 4 App. Cas. 454.
(2) 1 Hogan, 147.
(3) 2 Hud. & Bro. 128.
(4) Hay. & Jo. 597.
(5) 1 Ir. Eq. Rep. 200.
(6) 3 J. & Lat. 410.
(7) Hetley, 35.
(8) 5 B. & Ad. 507.

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This doctrine has never been applied to waste in felling timber. The reason seems obvious. One who makes improvements in a house, although in doing so he technically commits waste, nevertheless ameliorates the very thing said to be wasted: *Doherty* v. *Allman* (1). But a man who cuts down a tree, takes by the act a part of the inheritance, and he does not ameliorate that tree which is the part of the inheritance he takes. That he benefits the estate upon which the tree grew is no excuse, any more than the pulling down of a mansion-house would be excused because, as might possibly happen, the value of the whole estate would be increased by doing so: see per Lord Chancellor *Cottenham* in *Duke of Leeds* v. *Earl of Amherst* (2).

The conclusions to which I have come are: (1.) That Lady *Dashwood*, under the provisions of this will, was impeachable of waste. (2.) That cutting down timber trees of twenty years of age and upwards by such a limited owner is waste. (3.) That such waste is not excused because it may benefit the other trees or saplings or may cause seeds of timber trees to germinate in the wood. (4.) That there is no exception from the Common Law on this subject in favour of the limited owner of what is called a "timber estate." (5.) That a custom to control the Common Law in this respect, must be nothing less than an immemorial custom for a limited owner to commit such waste. (6.) That there is no evidence in this case of any such custom. (7.) That the usage proved is only that owners not impeachable of waste have adopted a mode of managing the woods which would be waste on the part of a limited owner impeachable of waste.

Lady *Dashwood's* executors have pleaded the *Statute of Limitations*. No argument was addressed to us in support of that plea, nor could it be maintained, for this action was commenced by the remainderman within six years after attaining his majority. It was decided in the *Duke of Leeds* v. *Earl of Amherst* (3), that where equitable waste has been committed time does not run until the estate of the remainderman falls into possession, and that it is not material that the waste complained of should have

(1) 3 App. Cas. 709. (2) 2 Ph. 123.
(3) 2 Ph. 117.

been committed by the tenant for life more than twenty years before his life estate determined. But this it seems is not the law where the waste is legal waste, as to which the owner of the first estate of inheritance in remainder may bring trover. In such a case he has *primâ facie* only six years after the act of waste: *Seagram* v. *Knight* (1); *Higginbotham* v. *Hawkins* (2). But here the remainderman did not come into existence till August, 1863, and the action was commenced in 1889, that is, within six years after he attained twenty-one, and he was entitled to do this under sect. 7 of 21 Jac. 1, c. 16. According to *Whitfield* v. *Bewit* (3), the timber when cut belonged to the owner of the first estate of inheritance, notwithstanding that other persons might come into existence who might be entitled to a prior estate tail, and the existence of an intervening estate of freehold in a tenant for life without impeachment of waste does not, it seems, prevent this: *Pigot* v. *Bullock* (4).

I am of opinion that the Plaintiff *Francis Dashwood* is entitled to an account of the timber improperly cut by Lady *Dashwood*, including in the word "timber" all oak, ash, and elm, and all beech in the county of *Bucks* so cut, and to payment of such proceeds out of her estate, with interest at 4 per cent., from the time of her death, as in *Duke of Leeds* v. *Lord Amherst* (5); but, as the other members of the Court are of a different opinion, of course my judgment cannot prevail.

Sir *H. Davey*, Q.C.:—I gather from the judgment of the majority of the Court that your Lordships are not of opinion that the usage or custom on which the judgment is founded extends to anything but beech. Although the greater part of the trees cut consist of beech, yet the cutting of oak, ash, and elm, forms a substantial part of our complaint, and the custom is set up, both in the pleadings and the evidence, with regard to all timber. The learned Judge below held that this was a timber estate, and that the custom extended to all classes of timber, and accordingly dismissed the action. If your Lordships take a

(1) Law Rep. 2 Ch. 628.
(2) Ibid. 7 Ch. 676.
(3) 2 P. Wms. 239.
(4) 1 Ves. 479, 484.
(5) 14 Sim. 367.

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different view, I ask for an inquiry as to the trees cut, other than beech trees.

LINDLEY, L.J. (after conferring with the other members of the Court):—This point seems to require some attention. The case had better be put into the paper to be mentioned another day.

1891. July 14. The matter was again mentioned to the Court.

LINDLEY, L.J.:—

When I wrote my judgment I was under the impression, as I then stated, that no point was raised as to the oaks in the beech woods as distinguished from the beech. Counsel for the Appellants say I was mistaken in this respect. My judgment is confined to beech and does not cover the oak, but that of Lord Justice *Bowen* does, and I concur in his judgment. Although his judgment covers more ground than my own, the two are in no way inconsistent. The appeal therefore will be dismissed, with costs.

The order had better be dated to-day.

Solicitors: *R. J. Dashwood; Crawley, Arnold & Co.; Mander & Watson; T. Lupton; Aston & Hughes.*

G. I. F. C.

HALL *v.* HALL.

FRY, L.J.

1891

Aug. 8.

[1890 H. 4335.]

Will—Construction—"Effects"—Real Estate.

A testator "gave, devised, and bequeathed" to his wife "all my furniture, goods, chattels, and effects that I may be possessed of at my decease, whatsoever the same may be or wheresoever the same may be situate." After the death of his wife he "gave, devised, and bequeathed," to be equally divided between three of his children until they should attain the age of twenty-one, "the furniture and moneys, or any property which my said wife may have become entitled to through this my will or through any other source"; and, after they had attained twenty-one, he directed that "the furniture, goods, chattels, and effects, whatsoever the same may be or wheresoever it may be situated, and any moneys my said wife may be entitled to at the time of my decease," should be equally divided amongst his six children. The testator's property substantially consisted of an undivided moiety in real estate, his personalty being of very trifling amount:—

Held, that although the use of the word "devise," or of the expression "whatsoever the same may be," would not of itself have been enough to make the word "effects" include real estate, the combination of "devise" with the words "whatsoever the same may be and wheresoever the same may be situate," followed in a subsequent clause by the word "property," used as equivalent to "effects," was enough the shew the intention to dispose of real estate, and that the undivided moiety passed by the will.

HENRY HALL made his will, dated the 10th of March, 1883, which, omitting the merely formal parts, was as follows:—

"I give, devise, and bequeath unto my dear wife, *Ann Hall*, for her own absolute use and benefit, free from the control of any future husband, all my furniture, goods, chattels, and effects that I may be possessed of at my decease, whatsoever the same may be or wheresoever the same may be situate, and I authorize my wife, *Ann Hall*, to raise any money that may be necessary, and to collect all amounts that may be due to me at the time of my decease, and request her to pay as soon as may be convenient after my decease all my just debts and funeral expenses; and I give, devise, and bequeath after the decease of my said wife, *Ann Hall*, to be equally divided amongst three of my children, if they should be living at the time of the decease of my said wife, *Ann*

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Hall—namely, *Olive Helena Hall*, *George Ellerson Hall*, and *Cecil Septimus Hall*—until they shall attain the age of twenty-one years, for their sole and separate use, the furniture and moneys, or any property which my said wife may have become entitled to through this my will or through any other source, for their sole and separate use, and after my said children, *O. H. Hall*, *G. E. Hall*, and *C. S. Hall*, have attained the age of twenty-one years, the furniture, goods, chattels, and effects, whatsoever the same may be or wheresoever it may be situated, and any moneys my said wife, *Ann Hall*, may be entitled to at the time of my decease, to be equally divided amongst my six children—namely, *O. H. Hall*, *G. E. Hall*, *C. S. Hall*, *Thomas Ellerson Hall*, *John Henry Hall*, and *Alfred Ellerson Hall*—that is to say, after the three first-named children have attained the age of twenty-one years. I hereby declare this document to be my last will and testament, and I appoint my said wife, *Ann Hall*, sole executrix of this my will."

The testator died on the 20th of March, 1890. He was possessed of personalty of very small value, and was entitled in fee simple to an undivided moiety of certain real estate, the legal estate in which was vested in the trustee of the will of *Thomas Hall*. The testator's eldest son, *Thomas Ellerson Hall*, claimed and received from the death of the testator the rents and profits of this moiety, alleging that it was not disposed of by *Henry Hall's* will. *Ann Hall*, the widow, commenced this action to establish her title to a life estate in it.

Chadwyck Healey, Q.C., and *E. Ford*, for the Plaintiff, referred to *Smyth* v. *Smyth* (1), and were stopped by the Court.

Haldane, Q.C., and *Bramwell Davis*, for *Thomas Ellerson Hall*:—

"Effects" *primâ facie* only applies to personalty, and though the Court leans against intestacy, it will not cut out the heir-at-law unless apt words are used to have that effect.

[FRY, L.J.:—Here you have three expressions which tend towards including real estate: the word "devise" is used; there

(1) 8 Ch. D. 561.

is a reference to locality, "wheresoever the same may be situate," and the general word "property" is used in the second gift.]

The use of the word "devise" is not sufficient to make "effects" include realty: *Camfield* v. *Gilbert* (1), though followed by the words "of what nature, kind, or quality soever." Words of locality can be satisfied without reference to realty, for personalty has locality. The word "property" here is only referential, and cannot enlarge the meaning of "effects": *Doe* v. *Earles* (2). *Doe* v. *Dring* (3) is very similar to the present case, and there "effects" was held not to pass realty. In *Hogan* v. *Jackson* (4) there is an expression of inclination to hold that "effects" was by itself sufficient to pass realty; but it was a mere *dictum*, the case turning on "effects both real and personal." The direction to divide in the present case is not suitable to real estate. We say that Vice-Chancellor *Malins*, in *Smyth* v. *Smyth* (5), confounded two distinct rules. If a testator devises all his real estate upon certain limitations, the Court will strive against a construction which leaves a gap causing a partial intestacy; but the Court will not lean against the heir-at-law when the question is whether the real estate is disposed of at all: *In re Cameron* (6).

H. F. Boyd, for the trustees of *Thomas Hall's* will.

FRY, L.J.:—

This is a will on which different minds might come to different conclusions; but I have arrived at a conclusion which is satisfactory to my own mind. The question is, whether the testator has disposed of an undivided moiety to which he was entitled in certain real estate. He begins his will by saying: "I give, devise, and bequeath unto my dear wife, *Ann Hall*, for her own absolute use and benefit, free from the control of any future husband, all my furniture, goods, chattels, and effects that I may be possessed of at my decease, whatsoever the same may be or wheresoever the same may be situate." I pause there to say that

(1) 3 East, 516.
(2) 15 M. & W. 450.
(3) 2 M. & S. 448.
(4) Cowp. 290; 3 Bro. P. C. 388.
(5) 8 Ch. D. 561.
(6) 26 Ch. D. 19, 25.

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this, in my opinion, is a universal gift of his property. He uses three words of gift—the general word "give," then "devise," which is the appropriate word for disposing of realty, and then "bequeath," which is appropriate to personalty, and not to realty, and he finishes with "whatsoever the same may be, and wheresoever the same may be situate," shewing an anxious desire to include everything. He then proceeds: "And I authorize my wife, *Ann Hall*, to raise any money that may be necessary, and to collect all amounts that may be due to me at the time of my decease, and request her to pay as soon as may be convenient after my decease all my just debts and funeral expenses, and I give, devise, and bequeath" (using the same three words as before) "after the decease of my said wife, *Ann Hall*, to be equally divided among three of my children if they should be living at the time of the decease of my said wife, *Ann Hall*, namely, *O. H. Hall*, *G. E. Hall*, and *C. S. Hall*, until they shall attain the age of twenty-one years for their sole and separate use the furniture and moneys or any property which my said wife may have become entitled to through this my will or through any other source, for their sole and separate use." The testator does not there use the same words of enumeration as before, but omits the word "effects," and brings in the word "property." It is said that this is only a description of what he had given before, and that is true, but the introduction of the word "property" explains the meaning he gave to the words he had previously used. He proceeds: "and after my said children, *O. H. Hall*, *G. E. Hall*, and *C. S. Hall*, have attained the age of twenty-one years, the furniture, goods, chattels, and effects, whatsoever the same may be and wheresoever it may be situated, and any moneys my said wife *Ann Hall* may be entitled to at the time of my decease, to be equally divided among my six children." In my opinion that is a universal devise and bequest of all the testator's property. The testator has used the word "devise," which is appropriate to realty; he has said, "whatsoever the same may be or wheresoever the same may be situate," and he has used the word "property" as equivalent to the expression he had used before.

The cases establish this, that the word "effects" will not *per se*

include real estate. They also establish that the word "devise" is not enough to give to "effects" a more extended meaning, and that the words "of what nature, kind, or quality whatsoever" are by themselves not enough. But no case goes to shew that the whole context which we have here is not enough. The Courts were formerly inclined to take a narrow view of the word "effects," though there is some authority the other way. Lord *Mansfield* went one way and Lord *Ellenborough* another. Vice-Chancellor *Malins* took the broader view where several circumstances, each of which might have been held insufficient in itself, concurred, and I think that no case precludes this. I therefore hold the Plaintiff entitled to the relief she asks.

Solicitor for Plaintiff: *Arthur E. Eves.*

Solicitor for *T. E. Hall: S. S. Seal,* agent for *Steavenson, Darlington.*

Solicitors for trustee: *Walker & Mewburn Walker.*

H. C. J.

CHITTY, J.
1891
July 7, 8.

In re FITZGERALD'S SETTLED ESTATES. SAUNDERS *v.* BOYD.

[1891 F. 304.]

Settlement—Portions—"Eldest Son"—Resettlement—Mortgage by Tenant for Life and Eldest Son—Anticipation of Interest—Double Portion.

By indenture of settlement, estates were limited to a father for life, with remainder to trustees for a term of years, with remainder to the father's first and other sons in tail male: the term was to secure £20,000 for younger children "other than an eldest or only son for the time being entitled under" the settlement. There were five children, *G.*, *C.*, and *E.*, sons, and two daughters. *G.*, the eldest son, on attaining his majority, joined with his father in barring the entail and resettling the estates to such uses as the father and son should jointly appoint, and subject thereto to the uses declared by the original settlement. Mortgages were created under the joint power to the amount of £8000, of which *G.* received £3000. *G.* predeceased the tenant for life without leaving male issue, and *C.* succeeded to the estates. The legal personal representatives of *G.* now claimed to be entitled to a further share in the portions fund:—

Held, that *G.* must be taken to have anticipated the whole of what otherwise might have come to him under the settlement, and that his legal personal representatives were not entitled to any further share in the portions fund; and that as there was only one person to be excluded as "the eldest son," *C.*, though he had succeeded to the bulk of the estates, nevertheless took a share in the portions fund.

Whether *G.*'s legal personal representatives would have been excluded from a share in the portions fund, if the joint power had never been exercised, or had only been exercised for an amount less than the value of a younger child's share, Query?

ADJOURNED summons to determine whether the legal personal representative of an eldest born son, who died before succeeding to the settled estates, was, under the following circumstances, entitled to receive any share of a fund raisable for the portions of younger children.

By articles for a settlement, dated the 21st of May, 1839, made on the marriage of *Henry Thomas George Fitzgerald* (then an infant), it was agreed that certain real estates should be limited to the use of the said *Henry Thomas George Fitzgerald* for life, with remainder to trustees for a term of 1000 years, with remainder to the use of the first and other sons of the said

Henry Thomas George Fitzgerald in tail male. The trusts of the term of 1000 years, which was for raising portions for younger children, were, in case there should be one or more child or children of the said marriage, "other than or not being an eldest or only son for the time being entitled, under the before mentioned limitations, to the settled estates, either in possession or in remainder expectant upon the decease of" the tenant for life, to raise for the portions of such child or children, "(other than or not being an eldest or only son for the time being entitled as aforesaid)" the sum, in the events which happened, of £20,000: this sum was subject to the usual power of appointment among the younger children by the husband and wife, and in default of appointment was to be paid to the younger sons at twenty-one, or to daughters at twenty-one or marriage. The articles also contained the usual hotchpot clause.

By a settlement of the 12th of April, 1841, endorsed on the said articles, the said estates were assured to the uses upon the trusts for the intents and purposes, and subject to the powers and declarations expressed and declared by the marriage articles.

There was issue of the said marriage five children—*George*, *Charles*, *Edward*, and two daughters. The eldest son *George* attained the age of twenty-one years in March, 1861, and in January, 1863, he, with the consent and concurrence of his father, the tenant for life, barred his estate in tail male, and resettled the said estates to such uses as the tenant for life (his father) and *George* should by deed jointly appoint, and subject thereto to the use of the father for life, in confirmation of the life estate limited to him by the said marriage articles and settlement, and after his death to such uses as *George*, in case he should survive his father, should appoint, and subject thereto, to the uses declared by the said marriage articles.

By an indenture of the 20th of February, 1863, the tenant for life and his eldest son *George* mortgaged the settled estates for £5000, in exercise of the aforesaid joint power of appointment; and, by virtue of the same joint power, they also created a further charge on the estates for £3000, by an indenture of the 11th of April, 1870.

Both the tenant for life and the eldest son *George* gave a receipt

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for the said sums of £5000 and £3000; but a part of these sums, amounting to £3000, was received by the eldest son *George*, and applied by him for his own use.

The sum of £5000, part of the portions fund, was appointed, in 1867, to one of the daughters on her marriage, and the residue of the said portions fund was, in March, 1868, appointed equally among the remaining younger children—*Charles*, *Edward*, and the other daughter.

On the 30th of July, 1873, the eldest son *George* died without male issue, having by his will appointed the defendant *Sprott Boyd* his executor. This will was proved on the 13th of March, 1891.

On the 25th of May, 1890, the tenant for life, *Henry Thomas George Fitzgerald*, died.

The total value of the settled estates, including a sum of £15,000, which had been raised and paid to three of the younger children, *Edward* and the two daughters, was stated to be over £70,000.

The surviving trustee of the said settlement now applied by originating summons for the direction of the Court as to whether *George* or *Charles* was to be excluded from a share in the portions fund, under the terms of the marriage articles as being "the eldest son."

Field, for the surviving trustee of the settlement.

Farwell, Q.C., and *Bramley*, for the legal personal representative of *George*:—

Charles having become an "eldest son" entitled to the bulk of the estate, the appointment of March, 1868, in so far as it gave £5000 to him, was ineffective. *Charles* was not an object of the power, therefore £5000 remains unappointed, and to this sum *George* became entitled by virtue of the hotchpot clause. We are willing to treat the £3000, received from the £8000 raised by the mortgages, in part payment of *George's* portion, but to the remaining £2000 we are clearly entitled.

[CHITTY, J.:—If there had been no disentailing deed, *George*, though the eldest born, would have been, for the purposes of this settlement, a younger son, because the "eldest son" has to be

ascertained at the period when the fund becomes distributable: *Collingwood* v. *Stanhope* (1).]

Yes, and the eldest son's estate through the medium of his legal personal representatives is entitled: *Ellison* v. *Thomas* (2). This disentailing deed and resettlement to the same uses has not affected *George's* interest; *Harrison* v. *Round* (3). The fact that *George* joined with his father in raising £8000 on mortgage, under the first power has not altered the limitations or the disposition of the estates in any way. *George* never became entitled to the "bulk of the estate;" though he may have received by anticipation £3000 of his £5000 portion.

[They also referred to *Wyndham* v. *Fane* (4), and *Meyrick* v. *Laws* (5).]

Byrne, Q.C., and *Osler*, for *Charles*:—

There is a great difference between a clause like the one now before the Court and shifting clauses that operate entirely under the *Statute of Uses*: *Collingwood* v. *Stanhope* (6), consequently some of the cases relied on by counsel for *George* do not apply. *George* having concurred with his father in barring the entail acquired a dominion over the settled estates which he exercised to the extent of charging the estates with mortgages for £8000. *George* has already received £3000 for his own use, and has by what he has done anticipated his interest, the rule against double portions applies, and he is not entitled to take any part of the fund provided for younger children.

Farwell, in reply.

CHITTY, J. (after stating the question raised for his decision, and the principles adopted by Courts of Equity in construing limitations of the kind now before him, as settled by *Collingwood* v. *Stanhope*, and having referred to the facts of that case and the decision, continued):—

The case which I have before me on the facts, is not the same

(1) Law Rep. 4 H. L. 43.
(2) 1 D. J. & S. 18.
(3) 2 D. M. & G. 190.
(4) 11 Hare, 287.
(5) Law Rep. 9 Ch. 237.
(6) Ibid. 4 H. L. 43, 57.

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as *Collingwood* v. *Stanhope* (1), and so far as researches of counsel have gone, there is no similar case reported in the books. What has happened is this. [His Lordship having stated the limitations created by the disentailing deed, continued:—]

It is not necessary for me to say what would be the result if the joint power, or the separate power, had not been exercised. Indeed it may be that, notwithstanding the words in the settlement, "entitled under the before-mentioned limitations to the settled estates," a Court of Equity would have regarded the substance of the thing, and had said, that inasmuch as the original settlement was left, in the result, unaffected, the disentailing and resettlement might be disregarded. I leave that question open. The joint power, however, was exercised. It was exercised first by creating a mortgage in 1863 for £5000, and again in 1870 for £3000, and thus the eldest son's portion, or in other words the bulk of the estate itself, was diminished to the extent of £8000 in value. Now, assuming it is material to see how much of the money thus raised, was received by the son *George* (and I am by no means satisfied that it is material), but assuming that it is, then appears the fact, that he had £3000, and following the reasoning of Lord *St. Leonards* in *Harrison* v. *Round* (2), there being no evidence to the contrary, the right conclusion of fact would be, that the £3000 was the present value of the sum of £8000 charged upon the reversion which would fall into possession on the death of the tenant for life. In other words, that there was a fair bargain between the father and the son, and that the son got his just proportion of the money that was raised. That that was so in fact I can hardly doubt, because the father lived twenty-seven years after the £5000 was raised, and twenty years after the £3000. The estate therefore is diminished in value to *Charles*, who, in the events which have happened, succeeds to it under the settlement, by a sum of £8000, and the value of the £8000 has been received by *George* the eldest son. *George* therefore has had a substantial portion out of the estate, and a portion which is more than equal to his proportionate part of the £20,000 raisable, in the events that have happened, for the younger children. To that extent he has anticipated

(1) Law Rep. 4 H. L. 43. (2) 2 D. M. & G. 203–206.

what otherwise would have been coming to him, and he has had his portion of the estate. There might be a question of some nicety in cases of this kind, where on a similar transaction to those which I have mentioned, a small or trifling sum had thus come to the oldest born son. In such a case as that it may be, that the sum, if a trifling one, would be disregarded, or that it would be brought into account. Such questions as that I leave untouched, but it appears to me that where the eldest son, in virtue of his ownership of the estate itself, and the right which he had concurrently with his father to charge the inheritance, has charged the inheritance with a sum equal to, or more than the amount of, his just share of the fund provided for younger children, that there the doctrine of double portions applies against him, and that he cannot take any part of that which is commonly termed the portions fund. Upon this ground I think that *George* is therefore excluded. *George* being excluded by virtue of his having had, before the time of the distribution, the benefit of a sum exceeding his just share of the portions fund, cannot claim to be a younger son and share again, taking a double portion of this fund. That being so, as there is only one person to be excluded in virtue of his being "the eldest son for the time being entitled" under the limitations, to the settled estate, it follows that as *George* is excluded, there is no one else to be excluded, and consequently *Charles* takes a share in the portions fund.

Solicitors: *Field, Roscoe, & Co.*, agents for *Taylor, Jeffery, & Little, Bradford; Cowlard & Chowne.*

W. C. D.

CHITTY, J. *In re* POOR'S LANDS CHARITY, BETHNAL GREEN.

1891

July 21, 22.

Charity—Application for a Scheme—Withdrawal of Application—Jurisdiction of Commissioners—Charitable Trusts Act, 1860 (23 & 24 *Vict. c.* 136), *ss.* 2, 4, 6, 8 [*Revised Ed. Statutes, vol. xiii., pp.* 894, 895].

Where a formal application for a scheme, pursuant to the *Charitable Trusts Act*, 1860, has once been made, the jurisdiction of the Commissioners attaches absolutely to the charity, and cannot be stopped or put an end to by a withdrawal of the application before the scheme has been completed and sealed.

PETITION by seven out of ten trustees of the *Poor's Lands Charity, Bethnal Green*, appealing against an order of the Charity Commissioners for *England* and *Wales*, dated the 27th of February, 1891, establishing a scheme for the future regulation of the charity. This order was appealed against on several grounds; but the only question argued that calls for any report was the objection taken as to the jurisdiction of the Commissioners, and the facts material for the purposes of this part of the appeal were as follows. The charity was founded in 1690, since which date its affairs had been managed and administered by a succession of trustees. In November, 1888, formal application in writing, pursuant to sects. 2 and 4 of the *Charitable Trusts Act*, 1860, was made to the Charity Commissioners for a scheme for the future regulation of the charity: the application was signed by a majority—eight out of eleven—of the trustees. The scheme, as finally given out by the Commissioners, did not meet with the approval of the trustees, and on the 25th of February, 1891, ten of the eleven trustees, comprising all who had signed the application to the Commissioners in November, 1888, with the exception of two—one of whom had died, and the other had left the country and ceased to be a trustee—signed and sent to the Commissioners a notice in writing as follows: "We, the undersigned, object to the Commissioners proceeding further with the application made to them" in November, 1888, "and such of us as signed the same revoke and annul our application."

Notwithstanding this notice, the Commissioners, on the 27th

of February, 1891, caused their seal to be affixed to the order establishing the scheme. Seven out of the ten trustees thereupon presented a petition praying that the said order might be discharged as made without jurisdiction. The petition was presented in pursuance of a resolution duly passed at a meeting of the trustees.

Byrne, Q.C., and *J. T. Prior*, for the Petitioners:—

The jurisdiction of the Commissioners arises only "upon the application" of the trustees under the *Charitable Trusts Act*, 1860. It is a pending application, and can be withdrawn at any time before the order establishing the scheme is sealed: the analogy of applications in the High Court applies—an application by writ, summons, or petition can be withdrawn at any time by the plaintiff or petitioner, who is *dominus litis*; so, too, a submission to arbitration can be withdrawn before the award is made. There is nothing in any of the *Charitable Trusts Acts* shewing that an application for a scheme cannot be withdrawn, or that the jurisdiction of the Commissioners, once invoked, is a continuing jurisdiction. In the present case, all the existing trustees who signed the application formally revoked and withdrew it; consequently, when the order was sealed, there was no application before the Commissioners; it was therefore void for want of jurisdiction, and ought to be set aside.

Vaughan Hawkins (Sir *H. Davey*, Q.C., with him), for the Charity Commissioners:—

The fallacy in the argument of the Petitioners consists in the proposition that an application for a scheme is a continuing or pending application. Once an application is made, the jurisdiction of the Commissioners arises. If this were not so, the death of one of the applicants would put an end to the jurisdiction. The Acts contain no provision for the withdrawal of the application, sect. 6, which provides for objections and suggestions being received from persons interested, and sect. 8, which provides an appeal, would be meaningless if the jurisdiction of the Commissioners could be put an end to by a mere withdrawal of the application.

CHITTY, J. *Byrne*, in reply.

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In re POOR'S LANDS CHARITY, BETHNAL GREEN.

CHITTY, J.:—

The question is whether, an application for a scheme having once been made pursuant to the Act of 1860, it is competent to the persons who made it, or, if by trustees, for a differently composed majority of the trustees, or for the whole of the trustees, to withdraw the application once made. It was said on behalf of the Petitioners that the trustees, or a majority, where, as in the present case, those who have the administration of the charity are unincorporated, can at any time at their will and pleasure withdraw the application; and various analogies were suggested which, it was argued, would assist the Court in determining this question; such, for instance, as a reference to arbitration where the arbitrator's powers arise by the consent of the parties, and also applications made to an ordinary Court of Justice by writ of summons or otherwise, upon which it is said that the Plaintiff or the Petitioner, or the party applying, is *dominus litis*, and can withdraw the application at any time before judgment. It appears to me that all such analogies are beside the question I have to determine, and that my decision must depend upon the intention that the Legislature has shewn in the Acts of Parliament constituting the Charity Commissioners, and particularly on the 2nd and 4th sections of the Act of 1860. The 2nd section of that Act confers upon the Commissioners the power of establishing a scheme for the administration of the charity. That is conferred upon them subject to the restrictions and rights of appeal which are given; and the jurisdiction comes into operation, according to the language of the section, "upon the application of any person or persons who, under the 43rd section of the *Charitable Trusts Act*, 1853, might be authorized to apply to any Judge or Court for the like purposes." The 43rd section of the Act referred to is wide, and confers a power of applying to the Court or a Judge, upon the Attorney-General, or (subject to certain provisions) upon "any one or more of the trustees or persons administering, or claiming to administer, or interested in, the charity which shall be the subject of such application," or upon "any two or more inhabitants of any parish

or place within which the charity is administered or applicable." In other words, the application may be made by various and numerous persons mentioned in the 43rd section. Then the 4th section of the Act of 1860 imposes a condition upon the Charity Commissioners' jurisdiction. "The Board shall not make any order, under the jurisdiction vested in them by this Act, with respect to any charity of which the gross annual income" amounts to £50 or upwards, "except upon the application of the trustees, or persons acting in the administration of the charity, or a majority of them, to be made to the Board in writing under their hands." The Act makes no provision for the withdrawal of the application. In my opinion, the right reading of that 4th section is, that when the condition, which is a condition precedent, is once performed, and a proper application has been made according to the section, the jurisdiction of the Board attaches absolutely. That, I think, is clear from the section itself. It is hardly necessary, in my opinion, to state any additional reasons for this conclusion; but if any additional reasons are required, reference may be made to the 6th section, which shews that when the jurisdiction has once attached, other persons become interested under the application. The Board are to receive and consider the objections and suggestions which are there mentioned, which may be made in the course of the proceedings, and it would be an extraordinary thing if, the jurisdiction once being set in motion by the application, it could be stopped by some of the persons only who had an interest in the result. And there would be even a more strange result if I acceded to the Petitioners' argument, because practically the majority of the trustees, who in the course of the proceedings would become aware of the nature of the scheme that the Commissioners intended to establish, could at any time, if they disliked some of its provisions, or thought them such as ought not to be inserted in the scheme, either for good or bad reasons, practically veto the exercise of the jurisdiction of the Commissioners. Again, the Act of Parliament has not made the jurisdiction of the Commissioners final, but has, by sect. 8, given an appeal; therefore, if there is any ground for appealing, the scheme may be (as proposed on this petition) reviewed by the Court in a proper case. For these reasons, I

CHITTY, J. 1891 *In re* POOR'S LANDS CHARITY, BETHNAL GREEN.

think that it is not competent for a subsequent majority (that is what it comes to) of the trustees to withdraw the application. There is, to my mind, this remarkable fallacy in the argument of the Petitioners: it is founded upon this being a continuing application, whereas the statute requires simply a single application to be made. If a continuing application were required, then it would be revoked by the death of one of the applicants, and that is exactly what has occurred in this case. It might further be found that there were one or two of the trustees who one day were in the majority for continuing the application, and were the next day in the majority against continuing the application; thus setting the thing going, and revoking it from day to day, or from month to month, at the pleasure of an uncertain majority. But I come back to the main reason on which my judgment is founded, namely, that this condition having once been performed jurisdiction attaches absolutely.

The other objections of the Petitioners against the scheme were then argued, with the result that the scheme was confirmed and the petition dismissed.

Solicitors: *R. Voss; J. M. Clabon.*

W. C. D.

ASHBURNER *v.* SEWELL.

CHITTY, J.

1891

July 29, 30.

[1891 A. 815.]

Vendor and Purchaser—Right of Way—Latent Defect—Compensation—Rescission.

By an agreement between a vendor and a purchaser, it was agreed that the vendor should sell and the purchaser buy the hereditaments described in the schedule and the inheritance thereof in fee simple in possession. Clause 6 was to the effect that the description of the property in the schedule was believed to be correct; but if any error should be found therein the same should not annul the sale, but compensation should be allowed in respect thereof; and clause 8 was to the effect that if the purchaser should insist on any objection or requisition in respect of the title which the vendor should be unable or unwilling to remove or comply with, the vendor should be at liberty to rescind the contract.

The schedule described the property as "all that messuage or dwelling-house called *Thatched House*, &c., with the stabling and outbuildings and garden thereto belonging, and also the piece of land adjoining, which said premises contain about 3½ acres, and are more particularly shewn in the plans hereto annexed."

Until after the contract had been entered into and the title investigated, neither the vendor nor purchaser was aware of a right of way which existed over a portion of the land contracted to be sold.

The purchaser insisting on his right to compensation under clause 6, the vendor gave notice of rescission under clause 8 of the agreement, and commenced this action to enforce the right, and to have it declared that the notice of rescission was good under clause 8:—

Held, that the existence of the right of way was a "latent defect" in the title; and although the error was one falling within clause 6 of the contract, it was none the less an objection to title within clause 8, and that the vendor was entitled to rescind.

ON the 11th of March, 1891, an agreement was entered into between the Plaintiff as vendor on the one part, and the Defendant as purchaser on the other, the material clauses of which are the following:—

"1. The vendor agrees to sell, and the purchaser agrees to purchase, the hereditaments described in the schedule hereto, and the inheritance thereof in fee simple in possession, at the price of £2000."

"6. The description of the property in the schedule is believed to be correct; but if any error shall be found therein the same,

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if capable of compensation, shall not annul the sale, but a fair compensation shall be allowed in respect thereof by the vendor or purchaser as the case may require, such compensation to be settled, if practicable, by arbitration."

"8. If the purchaser shall insist on any objection or requisition in respect of the title which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty, by notice in writing, to rescind this agreement."

The schedule to the agreement was as follows: "All that messuage or dwelling-house called *Thatched House*, situate, &c., with the stabling and outbuildings and garden thereto belonging, and also the piece of land adjoining, which said premises contain about 3½ acres, and are more particularly shewn in the plan hereto annexed and coloured pink and green."

Across the part coloured green in the plan were dotted lines indicating the existence of a bridle-road or pathway.

The abstract of title was duly delivered, and among the requisitions on the title delivered on the 13th of March, 1891, the fifth was as follows: "It is presumed that the roadway across the property sold, so far as it is included in the plan on the contract, is a private road without any right of way in any one else"; to which the vendor answered, "There is a right of way over the road, and is used by the owners and servants of the adjoining lands."

A correspondence took place between the solicitors of the parties on the subject, and ultimately the Defendant insisted that the error in the description was a subject of compensation, and must be referred, pursuant to clause 6 of the contract, to arbitration.

The Plaintiff thereupon gave the Defendant notice in writing that by virtue of clause 8 of the agreement she rescinded the agreement on the ground that the Defendant insisted on the objection in respect of the title raised by the 5th requisition, and which objection or requisition she was unable or unwilling to remove or comply with.

The Defendant having entered into possession of and commenced to build upon the land, the Plaintiff commenced this action, asking by the writ for a declaration that the agreement was rescinded by the notice so given and for an injunction.

The hearing of the motion was by consent taken as the trial of the action. It was admitted on both sides that, prior to the execution of the agreement and the delivery of the abstract, neither the Plaintiff nor the Defendant were aware of the right of way across the land coloured green on the plan.

Byrne, Q.C., and *Stokes*, for the Plaintiff:—

The question is whether this right of way, the existence of which was at the time the contract was entered into unknown to both vendor and purchaser, is an objection to title within clause 8, and we submit that it is; although the error is one which no doubt falls within clause 6 it is no less an objection to title within clause 8: *Mawson* v. *Fletcher* (1).

[They also referred to *Cato* v. *Thompson* (2); *In re Gloag and Miller's Contract* (3); *Bowles* v. *Round* (4).]

Whitehorne, Q.C., and *Dauney*, for the Defendant:—

The fact that this right of way does not appear in the description of the property in the schedule is an error which is the subject of compensation under clause 6. Anything which falls within clause 6 is excluded from the operation of clause 8. We submit that the Plaintiff was wrong in giving us the notice to rescind.

[They referred to *Painter* v. *Newby* (5); *Seaman* v. *Vawdrey* (6); *Hoy* v. *Smythies* (7); *Nelthorpe* v. *Holgate* (8).]

Byrne, in reply, referred to *Fry* on Specific Performance (9); *Cordingley* v. *Cheeseborough* (10).

CHITTY, J.:—

The only question which is now raised in this action is whether the vendor has according to the true construction of the contract a right to rescind. The vendor claims the right under clause 8 of the agreement. If the right has arisen it is clear on the facts

(1) Law Rep. 6 Ch. 91.
(2) 9 Q. B. D. 616.
(3) 23 Ch. D. 320.
(4) 5 Ves. 508.
(5) 11 Hare, 26.
(6) 16 Ves. 390.
(7) 22 Beav. 510.
(8) 1 Coll. 203.
(9) 2nd Ed. §§ 1259, 1260.
(10) 4 D. F. & J. 379.

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that such right has been exercised, as the vendor has given the proper notice as required by the contract.

For the purchaser it is argued that the question which has arisen as to the right of way, and which is the ground of the rescission of the contract by the vendor, is a matter which falls within clause 6 of the contract and the subject of compensation, and the argument is carried to this extent, that whatever falls within clause 6 is excluded from the operation of clause 8.

The contract shews that the hereditaments which are the subject-matter of the contract were sold and bought for an estate of inheritance in fee simple in possession. The hereditaments are referred to in clause 1 of the contract as being described in the schedule. The description in the schedule is an ordinary description of a house and lands, and refers to a plan annexed to the contract as more particularly shewing them. The plan is of a house and garden coloured red and of a field coloured green, and the road, over which, as it now appears, strangers have a right, is actually delineated. There are dotted lines on the plan which indicate that there is a road there on that part of the surface of the earth; but they do not indicate that any third person has a right to pass along such road. Neither the plan nor the schedule shews the existence of any right of way. The schedule only describes the hereditaments; but putting clause 1 and clause 6 of the contract together, I feel no difficulty in arriving at the conclusion that they and the schedule describe the property sold, and so describe it as to shew that it was the intention of the parties that the purchaser should obtain a title in fee simple in possession as a freehold without any burden. I am of opinion that it was part of the office of the schedule and plan to shew the existence of any burden affecting the purchaser's enjoyment of the hereditaments.

The contract does not shew that the hereditaments are sold subject to easements (if any), which is usual in contracts of this description.

The general rule of law in regard to rights of way may be stated as follows: where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection

to the title, as, for example, if the estate sold is a large one with a public highway running through it, then it is obvious that it is not intended to sell the property free from such right of way; but the purchaser would take subject to the right of way. The right is in such a case patent as opposed to the term "latent," as used by Lord *Loughborough* in the case of *Bowles* v. *Round* (1), where he said that the road going through a meadow was not a "latent defect."

In the case before me there is, as both sides have admitted, a "latent defect," the right of way being unknown to both vendor and purchaser, and the question is whether the existence of this latent right of way is a matter which falls within clause 6. I am of opinion that it does.

It was necessary for the vendor to assert that it does fall within that clause, because otherwise there would be no case for the operation of clause 8. The purchaser also contends that it falls within clause 6. That clause is so framed as to include not only misdescriptions, but unintentional omissions and errors, and only applies to those more or less inconsiderable errors which are fairly matters of compensation. Such a clause would not apply to a case where a house had been erroneously included in the description; but supposing one perch of land to which the vendor had no title was included in the acreage, such a small error as that would fall within clause 6. In my opinion, there may be errors within clause 6 which are also objections to title within clause 8, and errors within clause 6 which are not within clause 8.

The purchaser contends that none of the matters falling within clause 6 are within the operation of clause 8. There are no express terms in the contract shewing that to be the intention of the parties. In my opinion, the existence of this latent right of way, though falling within the operation of clause 6, is none the less an objection to title within clause 8. An argument was raised on the phrase in clause 6, that any error capable of compensation should not annul the sale, and that this was a matter for "fair compensation," and that it was inconsistent on the part of the vendor to say the sale should be annulled under clause 8.

Clause 6 is necessarily a vague clause; it does not say what

(1) 5 Ves. 508.

CHITTY, J.
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errors are to be the subject of compensation. The question whether errors which fall within clause 6 also fall within the protection given to the vendor under clause 8, is one of fact, to be decided in the particular circumstances of each case, and is one requiring great consideration. Take, for instance, the case where a piece of land is included in the description to which a title cannot be made out: regard must be had to the importance of that particular piece, and the amount of compensation which would have to be paid. I think it quite reasonable for the vendor to say, "I will reserve to myself a mode of escape from all the trouble of these inquiries and investigations and expenses of arbitration. I desire to settle the price myself; and if the purchaser insists on his objections to my title, I will retain in my own hands the power to rescind." That, I think, is a reasonable view to take of a contract like the one under consideration. In the result, I am of opinion that the purchaser's construction of the contract is not well founded, and that the objection raised is one of title falling within clause 8, and that the vendor was right in giving the purchaser notice of rescission.

The case of *Cato* v. *Thompson* (1) is an authority for the proposition that this is an objection to title falling within clause 8. Cases on the law of vendor and purchaser are often extremely complex, and require minute investigation; and, although from some of them general principles may be evolved, they often result merely in the Judge's opinion on the particular contract actually before him. The case of *Painter* v. *Newby* (2), relied on by the purchaser, was a case of that kind, and so also was the case of *Mawson* v. *Fletcher* (3), where it was stated both by *James*, L.J., and *Mellish*, L.J., that the objection there raised, although falling within the compensation clause, was none the less an objection to title. So far as one case can be an authority on a point of construction raised in another, the case of *Mawson* v. *Fletcher* is in favour of the vendor.

Solicitors: *Crosse & Sons; A. W. G. Batchelor.*

(1) 9 Q. B. D. 616. (2) 11 Hare, 26.
(3) Law Rep. 6 Ch. 91.

G. M.

LANE *v.* CAPSEY.

CHITTY, J.

1891

July 30; *Aug.* 5.

[1889 L. 3035.]

Practice—Receiver—Right of Way—Obstruction—Abatement—Inhabited House —Leave to Abate notwithstanding Receiver.

It is not the course of the Court to refuse liberty to try a right claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim.

In this action, which was for foreclosure, a receiver was appointed.

In an earlier action, a building society had established against the Defendants in this action, a right of way over part of the property now in the receiver's hands, but so much of their claim as asked for the removal of a house which obstructed the way was dismissed without costs, and no damages were given. The society now applied for leave, notwithstanding the receivership, to proceed under their common law rights to abate the obstruction :—

Held, that though the society had failed to obtain a mandatory injunction, it did not follow that they had lost their right to abatement, or that other means were not still open to them of asserting their rights of way; that according to the authority of *Davies* v. *Williams* (1) the Applicants might, after notice and request to remove the obstructing house, pull it down although it was actually inhabited, and that under these circumstances leave ought to be given to the Applicants, notwithstanding the receiver, to pursue any remedies or do any acts they might lawfully take or do to abate the obstruction.

Baten's Case (2) discussed.

Adjourned summons.

In December, 1888, the *Cavendish Permanent Benefit Building Society* commenced an action [1888 C. 4777] against *Capsey* and others claiming a declaration that they were entitled to rights of way over certain paths across an open piece of land at *Upton*, in the Parish of *West Ham, Essex*, an injunction to restrain the Defendants from erecting, or allowing to remain erected, any buildings upon the said piece of land so as to interfere with the rights of way alleged to be vested in the Plaintiffs, damages and costs.

On the 30th of April, 1890, Mr. Justice *Stirling* delivered judgment in this action, by which he decided that the Plaintiffs were

(1) 16 Q. B. 546. (2) 9 Rep. 53 b.

CHITTY, J.
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entitled to rights of way over the footpaths; restrained any further building on the said paths; but declined to grant a mandatory injunction for the removal of five houses that had already been erected so as to obstruct the rights of way over the said footpaths, and dismissed this part of the Plaintiffs' action without costs. He did not, however, give any damage for the obstruction.

This judgment was subsequently affirmed on appeal.

In December, 1890, the action of *Lane* v. *Capsey* [1889 L. 3035], a mortgagee's action for foreclosure, was commenced against practically the same Defendants as in the first-mentioned action.

On the 11th of January, 1890, a receiver had been appointed in *Lane* v. *Capsey* of certain property of the Defendants, which included the five houses obstructing the said rights of way of the *Cavendish Permanent Benefit Building Society*. The said society now applied by summons in the action of *Lane* v. *Capsey* for leave, notwithstanding the appointment of the receiver, to pull down the obstructing houses; but the application was subsequently amended at the hearing so as to ask only for leave to take such steps as they might be advised to abate the obstruction of their right of way.

Byrne, Q.C., and *W. S. Robson*, for the summons:—

Were it not for the receiver we should be able to pursue such remedies as the law gives us to abate this obstruction. We now come, that we may not be guilty of contempt, for leave to do that which we should be entitled lawfully to do without leave if there be no receiver.

F. Watt, for the Plaintiff *Lane*, took no part in the argument.

Farwell, Q.C., and *Beddall*, for the Defendants:—

Leave ought not to be granted unless the Court is satisfied that the Applicants have a *primâ facie* case for exercising the right claimed.

The Court must be satisfied that the Applicants have a right to do what they ask to be allowed to do; the possession of the receiver

is not to be disturbed unless the Applicants have a legal right, and the Court will look into that right: *Angel* v. *Smith* (1); *Empringham* v. *Short* (2); *Randfield* v. *Randfield* (3). The Court too, must see whether there is any foundation for the claim, and, if so, whether the leave asked will be the appropriate remedy; and we say there can be no abatement in this case, first, because the Court has already refused a mandatory injunction: *Baten's Case* (4), which is the converse of the present case, but its principle applies; secondly, because the Applicants cannot pull down these houses or any part of them now that they are inhabited: *Perry* v. *Fitzhowe* (5); *Jones* v. *Jones* (6). [They also referred to *Hyde* v. *Graham* (7).]

We submit that the mandatory injunction was refused because there was no legal right to abatement—at any rate, it is a fact in our favour that it was refused. Another point is that the Plaintiffs got no damages given them.

The application is in substance one for leave to commit an indictable offence; to turn out the alleged trespasser with violence is illegal: *Edwick* v. *Hawkes* (8).

Byrne, in reply:—

Randfield v. *Randfield* shews that the Court will not refuse to try a right against its receiver. The fact that the houses are inhabited makes no difference, if we give notice before we begin to pull down and request the Defendants to remove the obstruction: *Davies* v. *Williams* (9).

CHITTY, J. (after shortly stating the facts, continued):—

Application is now made on behalf of the *Cavendish Permanent Benefit Building Society*, who claim this right of way which is obstructed by the Defendants' houses, for leave to proceed, as they say, in a lawful manner, to enforce their common law rights, without being guilty of contempt by reason of the possession of the receiver. When such an application is made by a person not

(1) 9 Ves. 335, 340.
(2) 3 Hare. 461.
(3) 3 D. F. & J. 766.
(4) 9 Rep. 54 b. and 55 a.
(5) 8 Q. B. 757.
(6) 1 H. & C. 1.
(7) Ibid. 593.
(8) 18 Ch. D. 199.
(9) 16 Q. B. 546.

CHITTY, J. 1891 LANE v. CAPSEY.

a party to the action in which the receiver has been appointed, an application which may involve a disturbance of its receiver, the Court, as Lord *Eldon* says in *Angel* v. *Smith* (1), "will permit it wherever there is a legal right; but it will examine that right." *Turner*, L.J., in *Randfield* v. *Randfield* (2), laid down in language, which I will shortly quote, the nature and extent of the examination which the Court makes in applications of this kind. In that case a lord of a manor had asked that he might be at liberty to seize *quousque*, for non-payment of a fine, notwithstanding the appointment of a receiver, and *Kindersley*, V.C., had dismissed his application (3); and on this point *Turner*, L.J., says (4): "That decision appears to me to be exceedingly strong, for there can be no doubt that if the Court was not in possession of the estate by its receiver, the lord would be entitled to seize, in order to try the question whether the devisee was bound to take admittance or not; and it is not, as I apprehend, according to the course of the Court, to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim." That is the principle, therefore, on which I ought to act in considering the present application. The building society in December, 1888, instituted an action against the Defendants in this foreclosure action before Mr. Justice *Stirling*, which resulted in a judgment or declaration, which was affirmed on appeal, that the Plaintiff society was entitled to a right of way along these footpaths. The present Applicants, therefore, have a decision of the Court in their favour that they are entitled to a right of way over this particular footpath at present obstructed by the Defendants' buildings. The judgment also restrained any further building, and dismissed the claim for a mandatory injunction without costs. It is true that part of the relief sought was a mandatory injunction to remove these obstructing houses; but, for sufficient reasons, Mr. Justice *Stirling* refused to grant this relief, dismissing this portion of the action without costs. The result, therefore, is that the Applicants have a right of action for this obstruction, though not a right to a mandatory injunction; that, I think, is the true effect of the

(1) 9 Ves. 340.
(2) 3 D. F. & J. 766.
(3) 1 Dr. & Sm. 310.
(4) 3 D. F. & J. 771.

judgment. It is observable that Mr. Justice *Stirling* did not give the building society any damages for the obstruction, as he might have done, either common law damages, or damages under Lord *Cairns*' Act; also, that he did not order the obstructing building to be removed. On looking at the record it appears that a defence of laches and acquiescence was raised, and it is very possible that the learned Judge considered that the Plaintiffs were precluded by their own laches from obtaining the extraordinary remedy of a mandatory injunction. However, as I have already said, the Applicants have a right of some kind in respect of this obstruction, though they have not the one that is most usual in the present day—that is, the right to a mandatory injunction. It is not questioned before me that by reason of the abolition of real and mixed actions by 3 & 4 Will. 4, c. 27, s. 36, there is no remedy at law precisely applicable to the present case; the Applicants cannot now obtain a writ of *Quod permittat prosternere*, or any similar writ, as this is a private and not a public nuisance; but they say that they still have other remedies, and they desire to be allowed to abate the nuisance for themselves. If it were clear that they had no such right, it would be my duty to refuse this application; on the other hand, if there is really a question to be tried, it is my duty to accede to this application, with proper limitations. The Respondents rely on *Perry* v. *Fitzhowe* (1), as shewing conclusively that where a house is inhabited, as these houses are, the right of abatement does not exist; but though *Perry* v. *Fitzhowe* at first sight also appears to be an authority for such a proposition, yet it is certain that in *Davies* v. *Williams* (2) (where some of the same Judges who decided *Perry* v. *Fitzhowe* were again present) it was decided that the right to pull down a house, which was a nuisance by obstructing a commoner's right of common, did exist, notwithstanding the fact that the house was inhabited, where, before proceeding to exercise the common law right of abatement, the commoner had given proper notice to those in the house, and had requested them to remove it; and the judgment there says (3) that the case was distinguishable from *Perry* v.

(1) 8 Q. B. 757. (2) 16 Q. B. 546.
(3) 16 Q. B. 556.

CHITTY, J. 1891 LANE v. CAPSEY.

Fitzhowe (1) on the ground of notice and request to the occupier, and that there was nothing to take the case out of the general rule that a commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right as fully as he might otherwise, provided he does no unnecessary damage. I am not intending by these remarks to decide this point in favour of the Applicants, because all that I am asked to do is to remove the impediment to any lawful proceedings that may be taken, which exists by reason of the receiver, with whose possession no interference can be attempted (except by special leave) without running the risk of committing a contempt of Court.

Another point argued for the Respondents was, that there cannot be any right of abatement in the existing circumstances, because the Applicants failed to obtain a mandatory injunction, and for that they referred to *Baten's Case* (2), the substance of which is that if a party aggrieved has himself abated the nuisance, he could not have the actions which he then might have brought for the purpose of obtaining an abatement through the medium of the Court, and it was said to follow from this, that if the Court had refused the remedy in the first instance, then the right to abate did not exist. I leave that point open, and only add that I am not satisfied that this inversion of the proposition as stated in *Baten's Case* is justified according to law, and, though I do not mean to prejudice it, I will merely say that the reason given in the report of *Baten's Case*, why, after abatement, a man shall not pursue his remedy by writ, is that the nuisance, when it is abated, is gone; but where the Court has declined to apply the special equitable remedy of a mandatory injunction, it does not follow as a mere matter of course that the right to abatement is gone. I leave that question unprejudiced, that it may be discussed in the right way and at the right time.

The result, then, is, that I think I must give the leave; but I intend to guard my order.

In the first place, as to the order and the effect of the order, it is quite clear that I shall not give any leave which will authorize in any way any act which may be done on the part of

(1) 8 Q. B. 757. (2) 9 Rep. 54 b. and 55 a.

the Applicants: everything they do will be just as much at their own risk as if they had not obtained the order; because my order and my leave is merely to allow them to pursue whatever remedies the law gives them in a lawful manner, notwithstanding that the Court is in possession by its receiver; but no sanction and no authority will be conferred upon the Applicants by the order.

The Applicants are willing to take an order in a modified form —not asking leave to pull the buildings down as they did by the summons as originally framed, but to do such an amount of injury to the property as will raise the question of their right to abate—for this is the real object of the Applicants. It is by putting in force the right which they say exists in them at law, that they hope to compel the Respondents to take proceedings by way of injunction to restrain them.

For the Respondents I was pressed with this point, that if I gave any leave there must needs be a breach of the peace. I do not see that that is so at all. If there is a breach of the peace occasioned by the act of the Applicants for which the Applicants are responsible in law, my order will not save them from any criminal proceedings or other proceedings that may be instituted against them; but at the same time the form of order that I make is not intended to justify the Respondents in anything that they may do when the Applicants endeavour to enforce in the proper manner the right which they claim as being theirs at law. My order will simply give them leave, notwithstanding the receiver, to pursue any remedies or do any acts that they may lawfully take or do to abate the obstruction. I have dealt with this matter at some length for fear there should be any misapprehension as to the effect of the order which I am making.

Solicitors: *Francis Miller & Co.; Elton & Essell; Batchelor & Cousins.*

W. C. D.

NORTH, J.
1891
June 5.

MORRIS WILSON & CO. *v.* COVENTRY MACHINISTS COMPANY.

[1890 M. 908.]

Practice—Copyright in Design—Defendant's Particulars of Objections—Amendment—Costs.

The rule of practice in a patent action that a Defendant will be allowed to amend his particulars of objections on terms that the Plaintiff may elect to discontinue his action, and the Defendant bear the costs subsequent to the delivery of his first particulars, is applicable to actions to restrain infringement of copyright in registered designs.

THIS was an action to restrain the infringement of a registered design for a bicycle. The Defendants had given notice of motion to have the register of designs rectified by expunging the entry of the design in respect of which the Plaintiffs sued. That motion was ordered to stand over to be heard with the trial of the action.

The Defendants pleaded want of novelty. On the 30th of July, 1890, they delivered particulars of objections and instances of anticipations on which they intended to rely. In pursuance of an order obtained by the Plaintiffs they delivered further particulars. They took out a summons for leave to deliver further particulars; on that summons an order was made in Chambers on the 4th of May, 1891, giving them leave to deliver amended particulars and instances, and it was ordered that the Plaintiffs should have three weeks from the delivery of such amended particulars to elect whether they would discontinue the action; and that in case they did so elect the taxed costs of the Defendants down to the 30th of July, 1890, should be borne by the Plaintiffs, and the taxed costs of the Plaintiffs subsequent to that period should be borne by the Defendants.

A motion was now made on behalf of the Defendants, that the order made in Chambers might be discharged, so far as regards the terms on which leave to amend particulars of objections was given, or alternatively that the order might be varied in such manner as the Court might think just.

Bousfield, Q.C., and *Neill*, for the motion:—

The question is whether the practice established in patent actions, *Edison Telephone Company* v. *India Rubber Company* (1), applies. We admit that according to the usual practice, if this had been a patent action the order would have been made in the form in which it was made. In patent actions, however, the practice is not invariable; in one case, where even at the trial the defendant was allowed to deliver further particulars and the trial stood over, such terms were not imposed: *Pascall* v. *Toope* (2). The practice in patent actions is partly founded on statute, there being provision for the delivery and amendment of particulars in the *Patents, Designs, and Trade Marks Act*, 1883, in patent actions, but no express provision for such matters in actions relating to designs.

The register is *primâ facie* proof of the title of the registered owner; it is necessary therefore, in aid of a defence on the ground of want of novelty, to move to rectify the register. Such a motion has been made by the Defendants. If the Plaintiffs discontinue their action they should be allowed to do so only on submitting to have their design taken off the register. Or at least they should be put on terms not to proceed against the customers of the Defendants in the meanwhile.

Roger Wallace, for the Plaintiffs, was not called on.

NORTH, J.:—

The *Patents, Designs, and Trade Marks Act*, 1883, deals with three things—patents, designs, and trade-marks—as sufficiently connected to be made the subject of one Act. The first part of it deals with patents, and the provisions are very full. [His Lordship read the 29th section of the *Patents, Designs, and Trade Marks Act*, 1883, and proceeded:—]

Now, patent actions are peculiar in this respect, that there is an express provision made by statute for the delivery of particulars of breaches and particulars of objections. The statute authorizes amendments from time to time, but there is nothing in the statute further indicating what the course to be pursued

(1) 17 Ch. D. 137. (2) 7 Rep. Pat. Cas. 125.

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1891
MORRIS WILSON & Co. v. COVENTRY MACHINISTS COMPANY.

with respect to the delivery or the amendment of these particulars is. A practice has grown up by degrees in patent actions, which is now thoroughly well settled and established, and without going into the details of the orders that have been made, which, to some extent, vary, it comes to this: if a defendant has delivered particulars of objection, and he wishes at a subsequent time to amend them by adding more, he can only do so on certain terms. Of course, the defendant has to consider whether he wishes to add or not. If he thinks that he has what he considers is sufficient to make him safe, he does not wish to add more; but if, on the other hand, he thinks it sufficiently uncertain whether the particulars delivered at the proper time make him safe or not, he has a right, if he pleases, to ask leave to deliver others, and the Judge may, if he pleases, give him leave to do so. To put it shortly, the settled terms are, not going into the variations of the order which may be found in different actions, substantially these: that he will have leave to amend his particulars upon the terms that the plaintiff may discontinue his action within a fixed time; and, if he does this, defendant must bear all the costs incurred by the plaintiff during the interval between the time at which the particulars he obtains leave to deliver ought to have been delivered and the time at which they are delivered under the order giving leave to amend. That is the settled rule in patent actions. There may be disadvantages in the rule; and the Judge in every case may vary the order, giving leave to amend, so as to deal with the particular circumstances of the case as he thinks right. But the outline of the order I have sketched is that in general practice.

In the present case, we have got an action which is not a patent action, but an action in respect of the infringement of a registered design. That also is dealt with by the same Act, but not in anything like the same detail, and there is no provision in that case in the Act for the delivery of particulars at all. But here an order has been made which must be taken for all purposes to have been rightly made, that particulars should be delivered. Therefore, as regards this action, the position of matters is exactly the same as if the particulars had been delivered in a patent action, whether delivered by virtue of the Act

or by virtue of the order of the Judge which is not appealed from. The result is the same—particulars having been delivered, the Defendants now wish to add to those particulars. I think they are entitled to add to them. But what reason is there why the same course of practice should not be followed where the action is one for the infringement of a registered design, as that settled and adopted in the case of an action for the infringement of a patent? No reason has been suggested that seems to me a good one. No special reason has been suggested in respect of this particular action; and the question is, whether it is not a convenient rule that the course of proceedings adopted for patent actions should be followed as regards actions for infringement of registered designs. I thought in Chambers that it was a convenient course in general to follow, and that it should be followed in this case. I am not satisfied by anything I have heard now that the order I then made was not a right order to make. The result is, that I dismiss the motion.

Solicitors for Defendants: *Crowders & Vizard*, agents for *Browetts, Coventry.*

Solicitors for Plaintiffs: *Ward, Perks, & McKay.*

D. P.

STIRLING, J.
1891
May 26, 27; July 9.

In re APPLEBEE.
LEVESON *v.* BEALES.

[1889 A. 1390.]

Will—Legacy—Payments to Legatee by Testatrix—Gift or Loan—Appointment of Legatee as Executor—Release of Debt—Rebuttal of Claim in Equity by Presumption of Intention to forgive Debt—Admissibility of Evidence of Intention.

Testatrix by her will, dated in 1886, amongst other legacies bequeathed to the Plaintiff, a clergyman whose church she attended, two legacies of £100 each. She gave her residuary estate to the Defendant, and appointed the Plaintiff and Defendant to be her executors. By a codicil, dated in 1887, she gave additional legacies, including one of £700, to the Plaintiff, and in other respects confirmed her will. She afterwards in her lifetime made payments in cash on account of the legacies to the Plaintiff, though at that time he was indebted to her in a greater amount. She died in 1888, and her will was proved by the Defendant alone, liberty being reserved to the Plaintiff to do so. The Defendant alleged that the Plaintiff was indebted to the testatrix's estate to an amount exceeding the value of his legacies, and on that ground refused to pay them. The Plaintiff admitted that the testatrix had during her life made various payments to him and on his behalf; but alleged that such payments were intended by the testatrix to be gifts. The Court inferred from the evidence that the Defendant was a party to the making of the codicil in the form which it took, and was aware of the intention of the testatrix that the legacies should be paid to the Plaintiff:—

Held, (1.) that the appointment of the Plaintiff as executor released the debt at law although he had not proved the will; (2.) on the evidence, that any claim in Equity was rebutted by the presumption of the intention of the testatrix to forgive the debt; (3.) that evidence of the testatrix's intention to forgive the debt in her lifetime was admissible, and (4.) even if that were not so, that under the circumstances the Defendant could not as against the Plaintiff set up the debts due from him to the testatrix.

Wekett v. *Raby* (1) and *Strong* v. *Bird* (2) followed.

Selwin v. *Brown* (3) distinguished.

Adjourned summons.

The testatrix *Anna Eliza Frances Applebee*, a widow, by her will, dated the 9th of August, 1886, made bequests in favour of various persons, and, amongst others, bequests to the Plaintiff in the following terms: "I give and bequeath to the Rev. *Charles*

(1) 2 Bro. P. C. 386. (2) Law Rep. 18 Eq. 315.
(3) 3 Bro. P. C. 607.

Augustus Leveson, Vicar of *St. George's Church, Campden Hill, Kensington*, as a small token of affectionate remembrance, the legacy or sum of £100, and also the further sum of £100 to be used by him in or towards the restoration of his said church. I also give him all the pictures, paintings, and engravings now in or upon my said house, 80, *Palace Gardens Terrace*, except the portraits of myself and such other pictures as are otherwise disposed of by this my will." Her residuary real and personal estate she gave to the Defendant, and she appointed the Defendant and the Plaintiff executors of her will. She made a codicil dated the 11th of July, 1887, and thereby confirmed her will in all respects, subject to the alterations made by the codicil, and she thereby gave to the Plaintiff an additional legacy of £700 and to two other persons additional legacies. The testatrix died on the 23rd of June, 1888; the will and codicil were proved by the Defendant alone, power being reserved to the Plaintiff to prove. The debts and funeral and testamentary expenses of the testatrix, and all the legacies given by the will and codicil other than those in favour of the Plaintiff, had been paid.

The Plaintiff having commenced these proceedings with the view of obtaining payment of the legacies, was met by the defence that he was indebted to the testatrix at the time of her death to an equal or greater amount, and on the 27th of January, 1890, an order was made in Chambers directing an inquiry whether at the death of the testatrix the Plaintiff was indebted to her in any and what sums. In answer to that inquiry the Chief Clerk made a certificate dated the 17th of March, 1891, finding that at the date of the death of the testatrix the Plaintiff was indebted to her in various sums, amounting in the whole to £2397 15*s.* 6*d.* This was a summons taken out by the Plaintiff to vary the certificate.

The evidence shewed that the testatrix was for many years previously to her death a member of the Plaintiff's congregation and was on terms of great intimacy with him and his family. She had from time to time, as the Plaintiff admitted, made payments to him or on his behalf; but the Plaintiff claimed that many of these payments were gifts in the first instance, and that such as were not subsequently became such by acts of the

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deceased. This was disputed by the Defendant, who was also the recipient of much bounty from the testatrix in her lifetime, and along with his wife lived in her house for ten years before her death. Among the payments which were admitted by the Plaintiff not to have been given in the first instance were certain sums paid to Mr. *Barnard*, the solicitor of the testatrix, in respect of loans made on the security of two indentures, dated respectively the 3rd of November, 1882, and the 3rd of November, 1883.

In 1877 the Plaintiff filed a petition in the Bankruptcy Court, and resolutions were subsequently passed by his creditors for the liquidation of his affairs by arrangement. Under such arrangement the Plaintiff came under the obligation of paying certain instalments, amounting to £350 each, in the November of each of the years 1881, 1882, and 1883. The instalments which fell due in 1881 were paid to a considerable extent out of the moneys furnished by the testatrix; but as to these no question now arose. For the purpose of paying the instalments which fell due in 1882 and 1883 two sums of £300 were borrowed by the Plaintiff from Mr. *Barnard*, and the repayment of those sums was secured by the indentures in question.

The indenture of the 3rd of November, 1882, was made between the Plaintiff of the one part, the testatrix of the second part, and *Barnard* of the third part. It recited that the Plaintiff had applied to *Barnard* for a loan of £300, and that the testatrix had agreed to become surety for the repayment thereof. It contained a joint covenant by the Plaintiff and the testatrix, that they or one of them would pay to *Barnard* £300 with interest at 3 per cent. on the 3rd of May, 1883, and an assignment by way of mortgage of a policy on the life of the Plaintiff. The indenture of the 3rd of November, 1883, was similar in form. The sum of £300, secured by the indenture of the 3rd of November, 1882, was repaid to *Barnard* by the testatrix in three sums of £100, paid on the 1st of November, 1883, the 12th of January, 1885, and the 18th of November, 1885. Of the £300 secured by the indenture of the 3rd of November, 1883, the sum of £250 was repaid to *Barnard* by the testatrix as follows: £100 on the 18th of February, 1885, £100 on the 16th of February, 1886,

and £50 on the 8th of January, 1887. The balance of £50 was on the 2nd of February, 1887, deducted by *Barnard* from moneys received by him on behalf of the Plaintiff's wife. In May, 1887, the testatrix wrote to the secretary of the insurance company to inform him that she had no interest in or claim upon the policy. On the 8th of February, 1888, Mr. *Barnard* wrote to the testatrix the following letter: "Dear Mrs. *Applebee*,—At Mr. *Leveson's* request, I now send you the two deeds dated respectively the 3rd of November, 1882, and the 2nd of November, 1883, relating to the two loans made at the dates named by me to Mr. *Leveson*, and for which you were a surety, the loans having been paid off. In connection with the loans there was effected by Mr. *Leveson* a policy in the *Economic Life Office* on his own life for £300, bearing date the 10th of November, 1882, and numbered 241,068; but as I understand you do not claim any interest in this policy, and as I have a lien on it for charges, I do not now send this to you. I understood you to say on more than one occasion that you did not intend to hold Mr. *Leveson* indebted to you for any moneys paid by you in connection with these loans, and you may remember that I advised you that you should state under your own hand and make it quite clear that such was your intention." At this time the testatrix was in bad health, and nothing was done by her in pursuance of the matter; but, according to the evidence of Mr. *Barnard*, he had conversations with the testatrix which indicated an intention on her part that the Plaintiff should not be called upon to repay the sums which had been paid by her under the deed. On the 16th of November, 1887, the Plaintiff wrote the following letter to the testatrix: "Dear Mrs. *Applebee*,—I am putting into writing what I spoke to you about this afternoon, which also I named to the Colonel" (the Defendant) "a day or two ago. I am still greatly worried about money matters, and if instead of leaving me the amount mentioned in the codicil to your will you could manage to let me have a portion of it—say £200—now, reducing the legacy by that amount, it would greatly relieve me, and confer a double kindness. You have been already so good and generous to me that I deeply regret having to turn to you again so soon, and only the most urgent necessity compels it." Then he added:

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"Would it be possible for you to send me a cheque for £65 to-morrow morning?" This letter was put in evidence by the Defendant, who stated that in pursuance of the request contained in it the testatrix sent to the Plaintiff, on the 17th of November, 1887, a cheque for £65, and that in further pursuance of the said request she "lent and advanced" to the Plaintiff by subsequent cheques three sums of £100, £40, and £60, making £265 in all. These sums were not found to be debts by the Chief Clerk; but it was not disputed by the Plaintiff that they must be taken to have been paid by the testatrix on account of the legacy. The Plaintiff in an affidavit filed by him deposed as follows: "With reference to the legacies which Mrs. *Applebee* has left to me in the codicil to her will, I say that I had two conversations with the Defendant himself as to same. The first of these conversations took place before Mrs. *Applebee* executed the codicil to her will. The Defendant suggested to me that instead of giving me anything further by a codicil to her will, Mrs. *Applebee*, he thought, had better make a present gift to me of whatever she intended to leave me. The second conversation took place shortly after the codicil had been executed. He told me that Mrs. *Applebee* had made a codicil to her will, and had, when she was about to make it, expressed a desire to leave more for the church (my church); but that he, the Defendant, had told her that there were likely to be legal difficulties in the way of doing this, and that he had advised her that she had better leave any amount she wished to leave for the church to me instead. I had suggested to her that, having regard to how much she had already done for me, if she wished to leave or give more, she should give it to the church rather than to me." These statements were not contradicted by the Defendant.

Hastings, Q.C., and *Hatfield Green*, for the Plaintiff:—

These sums were all gifts: *Hill* v. *Wilson* (1); *Fowkes* v. *Pascoe* (2). Here the evidence of the Plaintiff is confirmed not only by the admissions and statements of the testatrix herself, but also by others. The Defendant himself does not venture to say that they were loans.

(1) Law Rep. 8 Ch. 888, 897. (2) Law Rep. 10 Ch. 343.

[STIRLING, J.:—What do you say as to the amounts paid as surety?]

They were gifts also. Why should not an undertaking to pay a sum of money for another be treated as a gift? Moreover, if these payments were loans, the debt is cancelled at law by the appointment of the Plaintiff as executor: *Strong* v. *Bird* (1).

Buckley, Q.C., and *Popham*, for the Defendant:—

The relationship of debtor and creditor existed between the Plaintiff and the testatrix. All the surrounding circumstances point to that conclusion: *In re Finch* (2).

[STIRLING, J.:—How do you get over *Strong* v. *Bird*?]

The testatrix never gave up the right to call for payment if she had been minded to do so. The Plaintiff never proved the will; the debt, therefore, is not extinguished at law: *Williams* on Executors (3). If the relationship of debtor and creditor existed down to the death of the testatrix, it could only be got rid of by a valid testamentary disposition: *Selwin* v. *Brown* (4).

[STIRLING, J.:—How do you reconcile that with *Strong* v. *Bird*?]

Selwin v. *Brown* was not cited in *Strong* v. *Bird*.

[STIRLING, J., referred to *Cross* v. *Sprigg* (5).]

No doubt if intention not to sue for it can be shewn, then the appointment of executor is enough.

[STIRLING, J.:—What stronger evidence of intention could there be?]

There is nothing to shew that the testatrix meant to relieve the Plaintiff altogether from his liability, and to deprive herself of the right to sue him if she was minded to do so. If that is so, the mere appointment of the debtor as executor is not enough. It cannot have the same effect as a testamentary disposition. In *Strong* v. *Bird* the evidence was perfectly clear. Conversations took place there in the presence of a third party, who was

(1) Law Rep. 18 Eq. 315.
(2) 23 Ch. D. 267.
(3) 8th Ed. p. 308.
(4) 3 Bro. P. C. 607.
(5) 6 Hare, 552.

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called as a witness and corroborated. There was also corroboration by documents and by the whole course of conduct of the parties. So far as intention went it was a certainty.

[STIRLING, J.:—I have a very strong opinion as to the intention of the testatrix in this case.]

The evidence of such intention is that of the Plaintiff alone.

Hastings, in reply:—

The burden of shewing such intention is not upon the Plaintiff at all. The surrounding circumstances must be looked at. No receipt was ever given for any of the sums, and the presumption of intention is all in my favour.

1891. July 9. STIRLING, J., stated the facts, and said that the payments of £65, £100, £40, and £60, must be taken to have been made by the testatrix on the terms of the letter of the 16th of November, 1887—that was to say, on account of the legacy bequeathed by the codicil; and held that, inasmuch as at the time of those payments the Plaintiff was indebted to the testatrix in an amount largely exceeding that of the legacies bequeathed to him by the will and codicil, those payments afforded cogent evidence that the legacy bequeathed by the codicil was intended by the testatrix to be actually paid to him, and not to be satisfied by the appropriation thereto of any sums in which he might have been indebted to her. His Lordship then continued:—

It appears, therefore, that the Defendant was a party to the making of the codicil in the form which it actually took; and I further infer from the statements made in the early part of the Plaintiff's affidavit (which are in accordance with the reference contained in the letter of the 16th of November, 1887) that the Defendant was aware of the intention of the testatrix that the legacy should be actually paid to the Plaintiff. At the hearing the Plaintiff's case was mainly rested on the decision of Sir *George Jessel*, the late Master of the Rolls, in *Strong* v. *Bird* (1). It was there held that, where a testatrix was proved to have intended to forgive a debt and make the debtor her executor,

(1) Law Rep. 18 Eq. 315.

the debt was gone, because the appointment of the debtor as executor released the debt at law, and any claim in Equity was rebutted by the evidence of a continuing intention on the part of the testatrix to forgive the debt. Here the Plaintiff has been appointed executor, and the payments in pursuance of the letter of the 16th of November, 1887, afford strong evidence of intention on the part of the testatrix to forgive the debt. It was said, however, that it was necessary, in order that the debt should be released at law, that the Plaintiff should prove the will. This contention does not appear to be borne out by the authorities cited in *Williams* on Executors (1); but even if it were, the Plaintiff is ready and willing to prove, and I should give him an opportunity of so doing, if necessary.

It was further contended that the evidence as to the testatrix's intention to forgive the debt was inadmissible; and in support of this the case of *Selwin* v. *Brown* (2) was cited. There the testator bequeathed his residuary estate to his executors, one of whom, the defendant in the cause, was indebted to him in a sum of £3000. The attorney by whom the will was prepared gave evidence that the testator desired to give the debt to the defendant, and gave instructions to the attorney accordingly. The attorney refused to mention this in the will, insisting that the bond would be released by the defendant being appointed executor, and that the testator signed the will with full persuasion that the debt was extinguished. It was held that the evidence was inadmissible. It is to be observed that there was no evidence of any intention to forgive the debt otherwise than by the will; and the decision was that the evidence could not be admitted (in the language of Lord *Talbot*) "to make a construction against the plain words of the will. None of the cases" (his Lordship continues) "where parol evidence has been admitted have gone so far as the present case; the farthest they go is to rebut an equity or resulting trust."

Now the evidence adduced in *Strong* v. *Bird* (3) was of facts which shewed an intention on the part of the testatrix to forgive the debt in her lifetime, and not by means of the will; and it

(1) 8th Ed. p. 1317. (2) Temp. Talbot, 240; 3 Bro. P. C. 607.
(3) Law Rep. 18 Eq. 315.

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was unquestionably used by the Master of the Rolls to rebut an equity. That case may, therefore, stand consistently with *Selwin* v. *Brown* (1).

I have, however, come to the conclusion that, even if this were not so, the Defendant, under the circumstances which I hold to exist in this case, ought not to be allowed to set up any debt owing by the Plaintiff on the 16th of November, 1887, against the Plaintiff's claim to be paid his legacies after deducting what he received on the footing of the letter of that date.

In the case of *Wekett* v. *Raby* (2), *Raby* was indebted to the testator on a bond. According to *Raby's* case, the testator, in his last illness and a few days before his death, said to his executrix and residuary legatee, "I have *Raby's* bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die he shall have it, he shall not be asked or troubled for it." It was not alleged that the residuary legatee made any answer; she simply was silent. After the testator's death the executrix sued on the bond; but Lord *Macclesfield*, and afterwards the House of Lords, ordered it to be delivered up to *Raby* and cancelled. The ground for the decision is explained by Lord *Loughborough* (Lord Chancellor) in *Byrn* v. *Godfrey* (3). After referring to the evidence, in which there was some conflict, his Lordship said that the Court had a fair ground to conclude that the case stood according to the representation of the plaintiff; "and, being so, the testator talking to a residuary legatee, and that being admitted, so as that the Court has sufficient evidence, the residuary legatee will not be permitted to benefit herself by that, which was not given to her. It is very near an undertaking by her to do something if the will is not changed. Therefore, the silence is assent on the part of the residuary legatee, and an engagement, which in point of conscience ought not to be broken by her." The authority of this case is recognised by Lord *Cottenham* in *Flower* v. *Marten* (4), and is recognised and commented on by Vice-Chancellor *Wigram* in *Cross* v. *Sprigg* (5). The Vice-Chancellor says:

(1) Temp. Talbot, 240; 3 Bro. P. C. 607.
(2) 2 Bro. P. C. 386.
(3) 4 Ves. 5, 10.
(4) 2 My. & Cr. 459.
(5) 6 Hare, 552, 556.

"The circumstances of that case bring it within the principle examined by the Vice-Chancellor in *Podmore* v. *Gunning* (1), and to that principle the decision in *Wekett* v. *Raby* (2) is referred by the Lord Chancellor in the case of *Byrn* v. *Godfrey* (3). It would have been a fraud in the residuary legatee to enforce the bond."

Here the Defendant is residuary legatee. He was party to the making of the codicil as it now stands. He was aware, as I think, of the intention of the testatrix that the legacy thereby given to the Plaintiff should be paid in money, and he thus contracted an engagement which (to use Lord *Loughborough's* words) "ought not in point of conscience to be broken by him," to give effect to that intention. Consistently with that engagement, he cannot set up as against the Plaintiff any debt which was due from him to the testatrix on the 16th of November, 1887. The only payment made by the testatrix to the Plaintiff after the 16th of November, 1887, beyond the £265 which I have dealt with, was of a sum of £25 on the 21st of January, 1888. That was made on the footing of a letter dated on that day, the terms of which are consistent with the payment being made as a gift, which the Defendant swears that it was. Under all the circumstances, I am prepared to accept that statement.

I think, therefore, that the Chief Clerk's certificate ought to find that, at the death of the testatrix, the Plaintiff was not indebted to the testatrix in any sums, other than the £265, which the Defendant is entitled to set up as against the Plaintiff, and that it must be varied accordingly. The £265 is to be taken on account of the legacy.

Solicitor for Plaintiff: *G. W. Barnard.*
Solicitors for Defendant: *Wilkinson & Son.*

(1) 7 Sim. 644. (2) 2 Bro. P. C. 386.
(3) 4 Ves. 5, 10.

G. A. S.

STIRLING, J.
1891
July 7, 8, 9.

GENERAL AUCTION ESTATE AND MONETARY COMPANY *v.* SMITH.

[1889 G. 1688.]

Incorporated Company—Trading Company—Implied Power of Borrowing Money.

A company established under the *Companies Act*, 1862, for the purpose of the sale and purchase of estates and property, the granting of advances on property intended for sale, and loans on deposit of securities, and the discounting of approved commercial bills, had under its memorandum and articles of association no express power to borrow money. The company received deposits and discounted bills; and one of its directors, who was also a depositor, advanced money to the company upon the security of an equitable charge on realty belonging to the company, in order to enable it to repay money due to himself and another depositor.

The company was afterwards ordered to be wound up, and, in an action by the liquidator to set aside the security as *ultrà vires* the company, it was

Held, (1.) that the company was a trading company, and as such had an implied power to borrow money for the purposes of its business; and (2.), that the borrowing which had taken place was one properly incident to the course and conduct of the business of the company for its proper purposes; and accordingly, that as the deposits were valid loans, it was competent for the company to borrow money for the purpose of repaying the depositors, and to give security to the person who made the advance, in the manner they had done.

The propositions of law as to the implied power of borrowing possessed by trading companies laid down in *Australian Auxiliary Steam Clipper Company* v. *Mounsey* (1) and *Bryon* v. *Metropolitan Saloon Omnibus Company* (2), are not affected by the decision in *Blackburn Benefit Building Society* v. *Cunliffe Brooks & Co.* (3), or the judgment of Lord *Esher*, M.R., in *Baroness Wenlock* v. *River Dee Company* (4).

THE Plaintiff company was incorporated in 1864 under the *Companies Act*, 1862.

The objects for which the company was established were defined by the memorandum of association to be as follows: "(*a.*) For the purpose of disposing of estates, houses, land, furniture, stocks-in-trade, and all other descriptions of property, either

(1) 4 K. & J. 733.
(2) 3 De G. & J. 123.
(3) 22 Ch. D. 61.
(4) 36 Ch. D. 675, n.

by public auction or private contract. (*b.*) To undertake the letting and general management of houses or land, including the guarantee of rents. (*c.*) To make valuations for administration; arrange compensation claims against railway companies or other parties; the preparing and passing residuary accounts. (*d.*) For granting immediate advances on property intended for sale, and loans on the deposit of securities. (*e.*) The discounting approved commercial bills. (*f.*) The company will also purchase houses, lands, &c., and insure plate-glass." The articles of association provided, by sect. 55, as follows: "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act or by these articles required to be exercised by the company in general meeting, subject, nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors, which would have been valid if such regulation had not been made."

There was nothing either in the memorandum or the articles of association as to the power of the company or of the directors to borrow money.

It appeared from the evidence that the company carried on a considerable business, and amongst other things largely discounted bills. It further appeared that the company was in the habit of receiving sums of money on deposit, usually repayable by the company on a week's, a month's, or three months' notice; and in some cases of a special character the money was repayable on demand. All the money so received by the company was paid in to the general account of the company with their bankers, and was applied for the purposes of the company as defined by the memorandum of association, and for no other purpose.

In April, 1887, the executors of a Mr. *Thunder*, a depositor, were pressing the company for the repayment of a sum of £700, which had been deposited by *Thunder*, and had become

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repayable; and other creditors were also pressing for repayment of their claims. The company was in need of money to pay off these claims; and the Defendant, *Robert Thomas Smith*, who was a director of the company, and also an unsecured depositor to the extent of £433 16*s.* 7*d.*, proposed to the directors to advance a sum of £666 3*s.* 5*d.* upon the terms of having the repayment of that advance and also of the debt of £433 16*s.* 7*d.* owing by the company to him, amounting in the whole to £1100, secured by an equitable mortgage of certain real estate belonging to the company, to be effected to his son, the late Defendant, Dr. *Henry Smith*. The proposal was accepted by the directors; a resolution authorizing the security was passed by the board, and on the 12th of May, 1887, the equitable mortgage in question was given in favour of Dr. *Henry Smith*. The company was ordered to be wound up on the 5th of November, 1887, and the depositors, to whom sums of money were owing at the commencement of the winding-up, had all been admitted as creditors of the company. This action was afterwards brought by the liquidator, on behalf of the company, in order to have the security of the 12th of May, 1887, set aside and cancelled as being *ultrà vires* the company.

After the commencement of the action the Defendant, Dr. *Henry Smith*, died, and his father, *Robert Thomas Smith*, who was his legal personal representative, was substituted as a Defendant.

Clare, and *C. E. Bovill*, for the Plaintiffs:—

This security is invalid. The company had no express power under its memorandum and articles of association to borrow any money whatever. If any power to borrow can be implied in the case of such a company, it can only be a power to borrow for the purposes of the company's business, as defined by its memorandum of association; and this money was not borrowed for any such purpose: See the judgment of Lord *Esher*, M.R., in *Baroness Wenlock* v. *River Dee Company* (1); *Blackburn Benefit Building Society* v. *Cunliffe Brooks & Co.* (2). If a company has the power of obtaining money by the issue of fresh capital (and the extent to which the power is available is not material), the implication of borrowing powers is negatived.

(1) 36 Ch. D. 675, n. (2) 22 Ch. D. 61; 9 App. Cas. 857.

We also say that the money borrowed in the present case was used for the repayment of money raised by the company for the purpose of a banking business, which was not one of the objects for which the company was established. This company has in fact been carrying on the business of bankers, instead of or in addition to its own legitimate business; and, according to recent decisions, even if they had an implied power to borrow on mortgage or otherwise for commercial purposes, they have not properly exercised such power, for they ought not to borrow so as to bring more working capital into their undertaking, and that is what they have done in this case.

[STIRLING, J., referred to *Brown* v. *Kidger* (1).]

Henry Smith was only a trustee for *R. T. Smith*, who, being a director, had full notice of the object for which this money was borrowed.

Hastings, Q.C., and *Horace Kent*, for the Defendant *R. T. Smith*:—

This company was a trading company; and every trading company, unless prohibited from borrowing by express stipulation in its memorandum or articles of association, has an implied power to borrow money for the purposes of its business. The existence of such a power is a commercial necessity; and an implied power of borrowing may be exercised for the purpose of giving security for a debt: *In re Patent File Company* (2). The business of this company was (*inter alia*) the selling and purchase of property, the granting of loans, and the discount of bills—a business which could scarcely be carried on without some borrowing powers. The position of a trading company like this is different from that of a benefit society, whose borrowing powers must be expressly defined and limited: *Laing* v. *Reed* (3).

[STIRLING, J., referred to *Lindley* on Companies (4) and *Lindley* on Partnership (5).]

No fraudulent preference is alleged, and the fact that a creditor

(1) 3 H. & N. 853.
(2) Law Rep. 6 Ch. 83.
(3) Law Rep. 5 Ch. 4.
(4) 5th Ed. p. 191.
(5) 5th Ed. p. 131.

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of a company is also a director does not affect the power of the company to give him a security for his debt: *In re Liverpool and London Guarantee and Accident Insurance Company* (1).

Baroness Wenlock v. *River Dee Company* (2) is not an authority that a trading company has no implied power to borrow for the proper purposes of its business.

[They also referred to *Rogers* v. *Ingham* (3), *Cooper* v. *Phibbs* (4), and *Small* v. *Smith* (5).]

Clare, in reply.

July 9. STIRLING, J. (after stating the facts of the case, continued):—

Now, under these circumstances, various questions were raised before me. First of all, it was said that the Plaintiff company had no power to borrow at all; and to this it was answered that the company was a trading company, and that a power of borrowing was a necessary incident to the constitution of such a company. In my opinion, the company is a trading company. If there was nothing else, the fact that the objects of the company include the discounting of approved commercial bills, and the fact that the company did carry on that species of business, prove it to be such. The question then is, whether a trading company has power to borrow, there being no express authority for the purpose to be found either in the memorandum or articles of association.

Now, upon this there is authority. In the first place, in the case of *Australian Auxiliary Steam Clipper Company* v. *Mounsey* (6), the circumstances were very similar to the present. There the company was incorporated under the *Joint Stock Companies Act*, 1856, and was in course of being wound up voluntarily, and the 3rd clause of the memorandum of association was in these terms: "The objects for which the company is established are to purchase a number of vessels, and to run them between *England* and *Australia*, or between any other countries or places that

(1) 46 L. T. (N.S.) 54; W. N. 1882, p. 18.
(2) 36 Ch. D. 675, n.
(3) 3 Ch. D. 351.
(4) Law Rep. 2 H. L. 149.
(5) 10 App. Cas. 119.
(6) 4 K. & J. 733.

may be deemed desirable, or to let out the same for hire, and generally to transact the business of shipowners." By the articles of association in that case it was provided that the regulations for the management of a company contained in Table B in the schedule to the *Joint Stock Companies Act*, 1856, should not apply; and that in their stead others should be substituted, by one of which it was declared that the company might, with the sanction of the company previously given in general meeting, increase its capital. Another of the regulations so substituted (the 55th) provided that the business of the company and all matters relating to the company and the affairs thereof should be controlled, managed, and regulated by the directors—a clause very similar to the 55th clause in the articles of association in the present case. Then it appears that on the 4th of August, 1857, at an extraordinary general meeting of the company, duly held for that purpose, the following special resolution was duly passed: "That the company be empowered, by the issue of debentures, to raise such sum of money as it may require not exceeding in the whole £50,000, and be authorized to assign the company's vessels to trustees to secure the due payment of the principal and interest secured thereby." A suit was afterwards brought to restrain the company from acting on this special resolution, and the defendants demurred generally for want of equity. Sir *William Page Wood*, V.C., says (1): "The question is, what were the powers of the directors of the plaintiff company under their memorandum and articles of association." Then, after reading the 3rd clause of the memorandum, and the 55th clause of the articles of association, he continues: "Now, it is plain from that clause, that the directors are empowered to do everything which the company itself might do, and which is not required either by the *Joint Stock Companies Act*, or by the articles of association of the company, to be done by a general meeting of the shareholders. The question, therefore, resolves itself into this simple form, whether, except for this transfer of their powers under the articles of association, this company could not raise, by mortgage of their ships, the money required for the purposes of their business. The act complained

(1) 4 K. & J. 738.

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of is simply that, the company having already mortgaged all their ships but one, and being in want of a further sum of money for the purposes of their business, the directors apply to the bankers, who are already creditors of the company, to advance the requisite sum; and finding that the bankers require security as well for their past as for future advances, they make a mortgage to a trustee for the bank of one of the company's ships." Then, after discussing an argument which arose on the terms of the deed, the Vice-Chancellor says: "It was said, that, looking to the objects for which the plaintiff company was established, the act complained of could not be said to fall within the scope of the corporate business, the business of this company being to make profit, not by trafficking in the sale of ships, but by sailing them; and that the ships being the instruments with which they carry on their trade as a company, to mortgage them, so far from falling within the corporate business, would be fatal to the very objects for which they were established. But I cannot conceive that a shipping company, having eight vessels for the purpose of carrying on a business like this, if they have occasion to buy a ninth, are precluded upon any ground of this description from mortgaging one of the eight for that purpose. If then this company had this power, the question, except as to the argument founded upon the special resolution of August, 1857, is at an end. I find no clause in the articles of association directing how money is to be raised for carrying on the business of the company. Yet every concern of this description requires money, from time to time, for the purpose of carrying it on. And nothing being specified as to borrowing, the measures to be adopted for that purpose are precisely those which it would fall within the province of the directors to take, until checked by some regulation of the company in general meeting, as prescribed by the 55th clause of the articles of association." Then he discussed the question whether there was any such regulation, and finding that there was none, he allowed the demurrer.

That seems, therefore, to be an authority that a shipping company without any express power in the memorandum or articles of association has power to borrow money for the purposes of the company.

Then in *Bryon* v. *Metropolitan Saloon Omnibus Company* (1), a similar point arose. The bill was filed by two of the shareholders in the *Metropolitan Saloon Omnibus Company* to restrain the directors from borrowing money on debentures. The company was formed as a limited company in September, 1856. The memorandum of association which was registered on the 26th of that month stated the objects of the company to be "the conveyance of passengers and luggage by the patent saloon omnibus between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

Nothing appears to have turned upon the general words in the last sentence I have read, and it does not seem to me that they ought to have affected the decision.

Then the company shortly after its establishment commenced operations. On the 9th of March, 1858, an extraordinary general meeting of the company was held at which the following resolution was passed: "As a special resolution within the meaning of the 33rd and 34th clauses of the *Joint Stock Companies Act*, 1856, that in addition to the regulations of the company contained in the articles of association and the table marked (B) in the schedule of the said Act, it be agreed as follows: that the directors may raise loans of money to the company under its common seal for such sums, for such times and at such rates of interest as the directors shall think fit, and renew the same from time to time, but so that the aggregate amount of such loans existing at any time shall not exceed the sum of £5000." That resolution was duly confirmed. At the time when it was passed about 13,000 out of the 20,000 shares had been taken, and upwards of £11,000 had been paid up in respect of them, leaving about £1000 unpaid; and under these circumstances the plaintiffs filed a bill in order to restrain the directors from issuing debentures under the resolution.

A motion for an injunction was refused by Vice-Chancellor *Kindersley*, who was of opinion that the acts sought to be restrained were effectually authorized by the resolution. The plaintiffs thereupon renewed the motion before the Lords

(1) 3 De G. & J. 123.

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Justices; but before the appeal motion was heard the defendants demurred to the bill. It was therefore arranged with the approbation of the Lords Justices, that the appeal motion and the demurrer should be heard together. At the hearing, it was argued that the issuing of debentures was *ultrà vires*; but Lord Justice *Turner* held that the act which was sought to be restrained was perfectly legal. In his judgment he discussed the *Joint Stock Companies Act*, and table (B) of it, and then at p. 128 he said, "The words of the 33rd section, indeed, seem wide enough to authorize even a change in the constitution of the company, but this could not have been the intention, as it would be opposed to the general scope of the Act. The fair construction I think is, that the 33rd section enables three-fourths to make regulations as to the mode of conducting the business of the company, but not to alter its general constitution; that it enables three-fourths to do anything which the whole might do short of altering the constitution of the company. Whether the act which is here sought to be restrained could legally be done without a special resolution, I do not say, but I think that it is an act which the special resolution was effectual to authorize. I am of opinion therefore that the application for the injunction fails." The demurrer was overruled without prejudice to any question. That appears to be an authority, therefore, that the raising of money by debentures in the case of a trading company simply established for the conveyance of passengers and luggage by omnibuses, is within the powers of the company, although there is no express authority conferred either by the memorandum or articles of association for borrowing.

It is quite true that Lord Justice *Knight Bruce* doubted it. He says (1): "My learned brother concurring in the opinion of the Vice-Chancellor the motion must be refused. As to the demurrer, I feel so much doubt whether the raising of money by debentures is authorized either by the 33rd section of the Act or by the 46th article of Table (B), that I think the demurrer ought not to be allowed; but I concur in the proposed order by which the question will be reserved till the hearing of the cause."

There are other cases mentioned in the last edition of Lord

(1) 3 De G. & J. 128.

Justice *Lindley's* book on Companies (1) which point in the same direction, as, for instance, *Gibbs & West's Case* (2) and *In re Hamilton's Windsor Ironworks* (3); but the two cases I have discussed seem to me to be authorities directly in point, and to be authorities that a trading company has an implied power of borrowing, though nothing may be said expressly in the memorandum or articles of association.

I also observe that it is a well-established rule as regards trading partnerships that a partner has power to borrow for the purposes of the partnership. The ground for the rule is that the exigencies of commerce render such a power necessary, and it seems to me that the existence of such a power in corporate trading companies may be justified on the same ground.

The authorities as to trading partnerships are collected in *Lindley* on Partnership (4).

I come to the conclusion, therefore, that there is a power of borrowing in this company as a trading company. But it was then said, that if this was so the power of borrowing had not been properly exercised. It was said that in truth the company did not borrow but simply carried on a banking business. That raises a question of fact, and the conclusion I come to upon it is that they did not carry on the business of bankers, but that they simply borrowed money for short terms on loan.

But then it is said, especially having regard to the recent decisions, that this was not a proper mode of exercising the power; that even if the company had power to borrow on mortgage and for urgent commercial purposes, they were not authorized to borrow in such a way as to bring into the concern more working capital. Now, upon that, it seems to me that the case of *Bryon* v. *Metropolitan Saloon Omnibus Company* (5) is a direct authority, because what was there done by the company was to raise money on debentures for the purpose of more effectually carrying on the business of the company, and that this is so, is shewn, I think, by the remarks of Lord Justice *Lindley* on that very case in *Lindley* on Companies (6). He says,

(1) Pages 190, 191.
(2) Law Rep. 10 Eq. 312.
(3) 12 Ch. D. 707.
(4) 5th Ed. p. 131.
(5) 3 De G. & J. 123.
(6) 5th Ed. p. 191.

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after discussing the subject of borrowing by companies: "Connected with the subject of borrowing money, is increasing capital. The difference between them is illustrated by *Bryon* v. *Metropolitan Saloon Omnibus Company* (1). In that case the capital of a limited joint stock company had been expended, and a majority of shareholders proposed to borrow money on the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the capital of the company could not be increased by borrowing money without the consent of all the shareholders. But it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied on had no application to the case; the capital of the company being one thing, and that which was sought to be increased by borrowing (namely, the cash in hand) being a different thing." It appears to me, therefore, that this company had power to borrow money in the way it did.

I do not think that the cases to which I have referred were intended to be overruled by anything that was laid down either in the *Blackburn Benefit Building Society* v. *Cunliffe Brooks & Co.* (2), or in the case of the *Baroness Wenlock* v. *River Dee Company.* (3) The proposition of law which was acted upon in those two cases was thus laid down by Lord *Selborne* in a single sentence in the former case (4): "There is also no doubt, that where there is not an express prohibition against borrowing in a case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes." In neither of these cases was the company whose powers were the subject of discussion a trading company, and the cases to which I have referred, viz., *Australian Auxiliary Steam Clipper Company* v. *Mounsey* (5) and *Bryon* v. *Metropolitan Saloon Omnibus Company*, appear to me to shew that in the opinion of Lord *Hatherley*, Vice-Chancellor *Kindersley*, and Lord Justice *Turner*, such a borrowing as has taken place here is properly incident to the course and conduct of the business of a

(1) 3 De G. & J. 123.
(2) 22 Ch. D. 61; 9 App. Cas. 857.
(3) 36 Ch. D. 675, n.
(4) 22 Ch. D. 70.
(5) 4 K. & J. 733.

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trading company for its proper purposes. That being so, it seems to me that I must treat the deposit made by Mr. *Thunder* as a valid loan to the company. It was competent, therefore, for the company again to borrow money for the purpose of repaying him, and to give security for the advance. That is shewn by *In re Patent File Company* (1).

I think, therefore, that the security given to the Defendant was valid, and that the action fails and must be dismissed with costs.

Solicitors: *W. Eley; G. Whale.*

W. W. K.

LOWTHER *v.* CALEDONIAN RAILWAY COMPANY.

STIRLING, J. 1891 *April* 8: *July* 22

[1889 L. 1990.]

Railway Company—Copyhold Land taken for Undertaking—Enfranchisement —Compensation—Basis of Assessment—Lands Clauses Consolidation Act, 1845, *ss.* 95, 96, 97 [*Revised Ed. Statutes, vol. ix., pp.* 651, 652].

In 1873 a railway company took possession of copyhold lands for the purpose of their undertaking, and erected cottages and works thereon. In November, 1875, the conveyance of the lands was executed and enrolled on the Court Rolls of the manor. No steps towards enfranchisement having been taken by the company, the lord of the manor, in 1886, required the company to enfranchise and pay him compensation. By the custom of the manor an arbitrary fine of two years' improved value was payable on the deaths of either lord or tenant, and of three years' improved value on alienation. It was referred to an arbitrator to settle the amount of compensation to be paid to the lord, and the arbitrator assessed the compensation upon the improved value of the land which had arisen by reason of the works executed by the company:—

Held, that as the fines which would be lost to the lord by the enfranchisement would have been assessed upon the improved value of the lands, the arbitrator had rightly assessed the compensation upon such improved value.

THIS was an action brought by the lord of the manors of *West Linton* and *Stainton*, in the county of *Cumberland*, in order to recover payment from the Defendants of a sum of £980, determined by an arbitrator to be the compensation payable under sect. 96 of the *Lands Clauses Consolidation Act*, 1845, to the

(1) Law Rep. 6 Ch. 83.

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Plaintiff in respect of the enfranchisement of certain copyhold lands, formerly held of the manors and taken by the Defendants for the purposes of their undertaking, and for the loss in respect of the rents, fines, dues, duties, and services or any other matters occasioned by the enfranchisement. The defence was that the compensation awarded was assessed on a wrong basis. At the trial the arbitrator was called, and questions were raised as to the admissibility of his evidence or of portions of it; but an arrangement was subsequently come to between the parties that the Court should decide the question between them as if it had been raised on a special case stated by the arbitrator.

The facts which gave rise to the dispute were these. In 1873 the Defendants, in exercise of powers conferred on them by an Act of Parliament (35 & 36 Vict. c. 114, with which was incorporated the *Lands Clauses Consolidation Acts*, 1845 (1), 1860, and 1869), took possession of the copyhold lands in question, and proceeded to erect thereon sixteen cottages and to construct a reservoir and other works for the purposes of their undertaking. Conveyances to the Defendants of the lands taken were executed

(1) The *Lands Clauses Consolidation Act*, 1845, provides, with respect to copyhold lands (sect. 95), that every conveyance to the promoters of the undertaking when entered on the rolls of the manor shall have the same effect as if the lands had been of freehold tenure, but that, until the lands shall have been enfranchised under the powers of the Act, they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed; sect. 96, that, within three months after enrolment of the conveyance, or within one month after the promoters shall enter upon and make use of the lands for the purposes of the works, the promoters shall procure the land to be enfranchised, and shall pay to the lord such compensation as may be agreed upon, and, failing agreement, that compensation for the enfranchisement shall be determined as in other cases of disputed compensation, "and in estimating such compensation the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for"; sect. 97 that "upon payment or tender of the compensation so agreed upon or determined, or on deposit thereof in the bank in any of the cases hereinbefore in that behalf provided, the lord of the manor whereof such copyhold or customary lands shall be holden shall enfranchise such lands, and the lands so enfranchised shall for ever thereafter be held in free and common socage . . ."

on the 4th of November, 1875, and were enrolled in the Court Rolls of the manors on the 16th of the same month.

No step having been taken by the Defendants to procure the lands to be enfranchised pursuant to sect. 96 of the *Lands Clauses Consolidation Act*, 1845, the Plaintiff, by a notice in writing under his hand dated the 30th of December, 1886, and delivered to and received by the Defendants on the 15th of January, 1887, required them to enfranchise the said lands, and to pay him the compensation in respect of the same and of the rents, fines, dues, duties, suits, boons, and services therefore due and of right accustomed, and in respect of his interest in the said lands; and the Plaintiff thereby gave notice that the amount of his claim by reason of the premises was £1500, and that, unless the Defendants were willing to pay that sum, and should enter into a written agreement for that purpose within twenty-one days after receipt of the notice, it was his desire that the amount to be paid to him by reason of the premises should be ascertained by arbitration according to the provisions of the Acts of Parliament on that behalf.

By an instrument in writing, dated the 22nd of September, 1887, under the hand of the Plaintiff and the seal of the Defendants, the Plaintiff and the Defendants appointed Mr. *Silas George Saul* as single arbitrator to settle and determine the moneys and compensation under the Acts to be paid by the Defendants to the Plaintiff for the enfranchisement of the lands in question, and for the loss in respect of the rents, fines, dues, duties, and services, or any other matters occasioned by the enfranchisement of the same. Mr. *Saul* made his award, dated the 31st of December, 1888, and thereby awarded and determined that the compensation to be paid by the Defendants to the Plaintiff in respect of the taking and enfranchisement of the lands in question, and for the loss in respect of the rents, fines, dues, duties, and services, or any other matters occasioned by the enfranchisement of the same, should be the sum of £980.

It appeared from the evidence of Mr. *Saul* that, according to the customs of the manor of *West Linton*, an arbitrary fine of two years' improved value was payable on the death either of lord or tenant, and an arbitrary fine of three years' improved

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value on alienation. In the manor of *Stainton* the fines were fixed, and the question as regards the compensation payable in respect of the copyholds held of that manor was of very little importance. One lord of the manor of *West Linton* died in 1876, and another in 1882; and on their deaths fines became payable, the amounts of which were (by agreement between the parties) determined by Mr. *Saul*, and included in the amount of compensation awarded by him, as already mentioned. It was stated by counsel for the Defendants that no objection was raised to the sums allowed in respect of these fines. The contention on behalf of the Defendants was that the compensation ought to be assessed on the basis of the unimproved value of the land at the time when the company first took possession thereof. For the Plaintiff it was contended, on the contrary, that compensation ought to be awarded having regard to the improved value of the land which had accrued by reason of the works executed by the Defendants since taking possession. The latter view was adopted by the arbitrator. The works by which the value of the land was enhanced were executed (at all events, to a considerable extent) before the 16th of November, 1875, the date of the enrolment of the conveyances to the Defendant company.

Beale, Q.C., and *C. Walker*, for the Defendants:—

An award has been made by the arbitrator in favour of the Plaintiff, and it has been arranged that the Court shall decide the question whether that award has been made upon the proper principle. We contend that it has not. As regards the manor of *Stainton*, the fines are fixed, and there is no question; but as regards the manor of *West Linton*, they are arbitrary, and the arbitrator is wrong in holding that the lord is entitled to compensation calculated upon the improved value arising from the works which the Defendants themselves have executed. He has reckoned the value of the lands after the company's buildings and works had been put upon it, instead of the value of the land and what was on it when the company took possession in 1873.

Where under other sections of the *Lands Clauses Consolidation Act* notice to treat is served, the basis of compensation is the loss suffered at that time. Under the 95th and 96th sections no

notice to treat is served; but as soon as the lord is damnified, and the property has so passed away from the tenant that its incidents will be different, the lord can claim his right to compensation. The plain and simple course, and that most in accordance with principle, is to take the value of the land at the time when the first right to compensation accrued, *i.e.*, when the company took possession, or when the conveyance was executed; otherwise a party might lose his compensation altogether by the accident that the value might be assessed at some intermediate period when the land was rendered temporarily worthless by the disturbance of executing the company's works. The general scheme of the *Lands Clauses Consolidation Act* is that every man's interest is to be valued "*rebus sic stantibus*": *Dimes* v. *Grand Junction Canal Company* (1); *Penny* v. *Penny* (2); *Stebbing* v. *Metropolitan Board of Works* (3); *Duke of Beaufort* v. *Patrick* (4); *Stretton* v. *Great Western and Brentford Railway Company* (5); *Lands Clauses Consolidation Act*, 1845, ss. 95, 96, 124, and 125.

Hastings, Q.C., and *Chadwyck Healey*, Q.C., for the Plaintiff:—

The case of copyholds taken by a corporation bears no analogy to that of freeholds taken under a notice to treat; and here the company, who entered on this land in 1873, had actually made their works upon it before conveyance and enrolment. The clue to the meaning of the sections in the *Lands Clauses Consolidation Act*, 1845, relating to copyholds, lies in the consideration that when copyhold lands are acquired by a corporation which does not die, the lord necessarily loses his fines and claims for forfeiture; subject to that, until enfranchisement, the lord's position is just the same as if there had been no proceedings under the statute. By the 95th section the fruits of the copyhold tenure are preserved to him; and by the 96th section, which provides for the enfranchisement, matters which would be lost to the lord by the vesting or the enfranchisement are to be estimated and allowed in the compensation: *Ecclesiastical Commissioners for England* v. *London and South-Western Railway Company* (6); and a company

(1) 3 H. L. C. 794.
(2) Law Rep. 5 Eq. 227.
(3) Ibid. 6 Q. B. 37.
(4) 17 Beav. 60.
(5) Law Rep. 5 Ch. 751.
(6) 14 C. B. 743.

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purchasing copyhold land is under an obligation of paying for all fines that would at any time thereafter have become due, but for the extinction of the copyhold tenure: *Re Wilson's Estate* (1); *Rhys* v. *Dare Valley Railway Company* (2); *Stoneham* v. *London, Brighton, and South Coast Railway Company* (3). The sections of the statute and the cases shew clearly that until enfranchisement the lord gets the fruits which are to be got, and it follows that, in determining the compensation to be paid to the lord, the arbitrator has rightly taken into consideration the improved value of the lands arising from the company's works.

Beale, in reply.

1891. July 22. STIRLING, J., stated the facts of the case to the effect above set forth, and then continued:—

The question turns on sects. 95, 96, and 97 of the *Lands Clauses Consolidation Act*, 1845. By sect. 95 a conveyance of copyhold lands to the promoters of the undertaking, when enrolled in accordance with the Act, has the like effect in respect of the copyhold lands as if the same had been of freehold tenure. Such a conveyance consequently vests the lands in the promoters, and does not pass merely an equitable estate, viz., that of the copyhold tenant on the rolls, as was held to be the effect of conveyances made under statutes earlier in date than the *Lands Clauses Consolidation Act*, 1845: see *Dimes* v. *Grand Junction Canal Company* (4). It is provided, nevertheless, that "until such lands shall have been enfranchised by virtue of the powers hereinafter contained they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed."

Then sect. 96 provides, that "within three months after the enrolment of the conveyance of any such copyhold . . . . lands, or within one month after the promoters of the undertaking shall enter upon and make use of the same for the purposes of the works, whichever shall first happen . . . the promoters of the undertaking shall procure the whole of the lands holden of such manor

(1) 3 D. J. & S. 410, 416, 417.
(2) Law Rep. 19 Eq. 93.
(3) Law Rep. 7 Q. B. 1.
(4) 3 H. L. C. 794.

so taken by them to be enfranchised, and for that purpose shall apply to the lord of the manor whereof such lands are holden to enfranchise the same, and shall pay to him such compensation in respect thereof as shall be agreed upon between them and him, and if the parties fail to agree respecting the amount of the compensation to be paid for such enfranchisement the same shall be determined as in other cases of disputed compensation; and in estimating such compensation the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold . . . lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for." By sect. 97, upon payment or tender of the compensation, the lord is to enfranchise the lands, and "the lands so enfranchised shall for ever thereafter be held in free and common socage."

Regard being had to the provisions of sects. 96 and 97, I read the provisions in sect. 95, that until enfranchisement the copyhold lands are to continue "subject to the same fines, rents, heriots, and services as were theretofore due and of right accustomed," in their literal sense—that is to say, the land is to be held subject to the payment of the fines, rents, &c., and not merely to the payment of compensation for them. This is in accordance both with what is laid down in *Ecclesiastical Commissioners for England* v. *London and South-Western Railway Company* (1), and with the interpretation placed on sects. 99–107 in *Stoneham* v. *London, Brighton, and South Coast Railway Company* (2).

It is, however, obvious that in many cases, perhaps in most, the lord would, notwithstanding this provision, lose a large portion of the fruits of the tenure. Fines, for example, are usually payable on death of the tenant or alienation by him; and these would cease upon the land becoming vested in such a corporation as a railway company for the purposes of the undertaking. It is accordingly provided by sect. 96 that, in estimating the compensation to be paid to the lord, loss in respect of fines, or other matters which would be lost by the vesting of the copyholds in the promoters of the undertaking, shall be allowed for.

(1) 14 C. B. 743, 754, 757. (2) Law Rep. 7 Q. B. 1.

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Sect. 96 imposes on the promoters the duty of procuring the enfranchisement of copyhold lands taken by them; but if they neglect to perform this duty, no obligation to enforce it is imposed on the lord. It is open to him to accept either of two courses. First, he may stand by and recover such fines, &c., as become payable under the provisions of sect. 96; or, secondly, he may take steps to have the compensation payable to him assessed under sect. 68.

In the present case the lords of these manors for a considerable time adopted the former course; and it is admitted that two fines have during this period become payable. These fines, according to the custom of the manor, would be in each case two years' improved value of the tenement. They have been duly assessed, and no question is raised before me as to them.

More recently, however, the present lord of the manor has required the compensation to be paid for enfranchisement to be determined, and in estimating it, the statute expressly provides that loss in respect of fines, or any other matters which would be lost by the enfranchisement of the copyhold lands, shall be allowed for. Now, by the enfranchisement, there will be lost to the future lords fines such as are admitted to have become payable since the Defendant company took possession. These, as I have already said, would, according to the custom, be assessed on the improved value of the tenement. It seems to me, therefore, that in determining the compensation the arbitrator was bound to take into consideration, as he has done, the improved value arising from the works executed by the Defendant company. In my opinion, the arbitrator has not proceeded on a wrong basis, and the Plaintiff is entitled to judgment for the amount awarded.

There will be judgment for the £980, with interest at 4 per cent. from the date of the award, and costs according to the Act.

Solicitors: *Ellis & Ellis; Gray, Mounsey, & Fuller*, agents for *Mounsey & Co., Carlisle.*

W. W. K.

In re LA COMPAGNIE GÉNÉRALE D'EAUX MINÉRALES ET DE BAINS DE MER.

STIRLING, J. 1891 July 24, 31.

Practice—Service out of the Jurisdiction—Trade-mark—Rectification of Register—Notice of Motion—Registered Proprietor out of the Jurisdiction—Rules of Supreme Court, 1883, *Order* v., *r.* 9; *Order* xi., *r.* 1; *Order* lxvii., *r.* 5—*Patents, Designs, and Trade Marks Act*, 1883, *s.* 90.

A notice of motion to rectify the register by striking out a trade-mark registered in the name of a foreign company not carrying on business within the jurisdiction was served on the Comptroller and the company.

Service on the company held bad and set aside.

Semble, the proper course was to proceed on the notice against the Comptroller, after sending a copy to the company with an intimation that proceedings which might affect its interests were pending.

Motion.

The above-named company was a French limited company, carrying on business in *Paris*, and having no place of business or other premises in *England*. The company was the owner of certain mineral springs in *France*, *Hungary*, and elsewhere, and was the registered proprietor of certain trade-marks, Nos. 49,266, 49,493, 49,494, and 50,050, which had been placed upon the English Register of Trade-marks in respect of the mineral waters and other products of one of the company's Hungarian springs.

On the 2nd of July, 1891, the following originating notice of motion was served upon the company in *Paris*, by leaving a copy of the same with their secretary:—

"In the High Court of Justice.

"Chancery Division.

"Mr. Justice *Stirling* (by certificate).

"In the matter of the Registered Trade-marks, Nos. 49,266, 49,493, 49,494, and 50,050, of *La Compagnie Générale d'Eaux Minérales et de Bains de Mer*; and in the matter of the *Patents, Designs, and Trade Marks Acts*, 1883 to 1888:

"Take notice that the Court will be moved before the Honourable Mr. Justice *Stirling*, on Friday, the 24th day of July, 1891, or so soon thereafter as counsel can be heard, on behalf of *Emily*

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Saxlehner, of 3, *Andrassy Street, Buda-Pesth, Hungary*, widow (trading as *Andreas Saxlehner*), that the register of trade-marks kept under the authority of the above-mentioned Acts may be rectified by removing therefrom the above-mentioned trade-marks; or that such further or other order may be made for the rectification of the said register as to the Court may seem just."

This notice was addressed to the company and to the Comptroller-General of Patents, Designs, and Trade-marks as Respondents, and the clerk who served it indorsed upon it a formal note of service.

Emily Saxlehner, on whose behalf it was served, was the widow and administratrix of one *Andreas Saxlehner*, who during his life had been the proprietor of certain mineral springs in *Hungary*.

No leave had been applied for or obtained for service of the originating notice out of the jurisdiction.

This was a motion on behalf of the company, the notice being headed: "In the matter of the *Judicature Acts*, 1873–1875, and in the matter of an originating notice of motion intituled, 'In the matter of the Registered Trade-marks' (setting out the title of Mrs. *Saxlehner's* notice of motion), that the service of the above-mentioned originating notice of motion upon them might be set aside with costs, to be paid by Mrs. *Saxlehner*, on the ground that the company had no place of business in the *United Kingdom*, and that no leave was asked or obtained, or, if asked, could have been obtained under the provisions of the *Judicature Acts*, 1873–1875, or the *Patents, Designs, and Trade Marks Acts*, 1883–1888, or the orders or rules of Court thereunder, for the service of the said originating notice of motion upon the said company out of the jurisdiction."

Hastings, Q.C., and *Sebastian*, for the company:—

The applicant had no right to serve the notice of motion upon us out of the jurisdiction without leave. The object of the notice was to bring us within the jurisdiction, and it might be made the foundation of further proceedings against us. This course has been taken in order to avoid the necessity of applying for leave to serve us with the notice out of the jurisdiction, which the Court

has no power to grant: *In re Busfield* (1). Leave may be given under certain special rules to serve third party notices out of the jurisdiction: *Swansea Shipping Company* v. *Duncan, Fox & Co.* (2); *Dubont & Co.* v. *Macpherson* (3); and so with an interpleader summons: *Credits Gerundeuse* v. *Van Weede* (4); and a notice to settle the list of contributories of a company, that not being the foundation of other proceedings: *In re Nathan Newman & Co.* (5). In the same way, a petition under the *Trustee Relief Act* may be served out of the jurisdiction without leave: *In re Jellard* (6).

Those cases, however, do not apply here; and the *dicta* contained in them are in our favour, having regard to the nature and consequences of the proceedings commenced by Mrs. *Saxlehner*. It is not for us to suggest the right course to be taken. These applications are, no doubt, usually made by originating motion; but there is nothing in sect. 90 of the *Patents, &c., Act*, 1883, to prescribe that as the only form of procedure. *Pinto* v. *Badman* (7) shews that the register cannot be rectified on counterclaim; but it does not lay down that this cannot be done in an action. If we had not moved to set aside the service, we should have been treated as submitting to the jurisdiction, and an order might have been made against us under sect. 90 (8) for payment of costs and damages.

In re Drummond's Patent (9) was a very different case, and is no authority against us.

(1) 32 Ch. D. 123.
(2) 1 Q. B. D. 644.
(3) 23 Q. B. D. 340.
(4) 12 Q. B. D. 171.
(5) 35 Ch. D. 1.
(6) 39 Ch. D. 424.
(7) 8 Rep. Pat. Cas. 181.
(8) Sect. 90 of the *Patents, &c., Act*, 1883, provides as follows: "(1.) The Court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making expunging or varying the entry, as the Court thinks fit; or the Court may refuse the application; and, in either case may make such order with respect to the costs of the proceedings as the Court thinks fit. (2.) The Court may in any proceeding under this section decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved. (3.) Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the Comptroller."
(9) 43 Ch. D. 80.

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Moulton, Q.C., and *Grosvenor Woods*, for Mrs. *Saxlehner*:—

It is not our object to compel the appearance of the company. The application to rectify the register may be made *ex parte*. It was necessary for us to give notice to the Comptroller-General under rule 49 of the Trade Marks Rules, 1890, and the object of sending the company a copy of the notice was simply to inform them that something was going to be done which might affect their interests. It must not be treated as service at all, but rather as a private communication not possessing any legal force, and not capable of being made the foundation of further proceedings. If we had not given the company any notice the Court might have refused to deal with the motion until we had done so, notwithstanding that no such procedure is suggested by the Act.

It was not open to us to proceed by writ in an action: *Pinto* v. *Badman* (1); and even if it were, we should not be able to get leave to serve out of the jurisdiction under Order XI., rule 1. This is a new statutory right which we are seeking to enforce, and we can only use the forms authorized by sect. 90. It is not necessary to have any respondents to the application, and there is nothing in the Act or the rules as to service of an originating notice of motion. We have followed the course indicated in *Re Amery Turner* (2); *Seton* on Decrees (3); *In re Gordon's Settlement Trusts* (4); *Credits Gerundeuse* v. *Van Weede* (5). By putting their trade-mark upon the English register the company have in effect submitted to the jurisdiction. Their motion to set aside the service does not come within Order XII., rule 30. It is therefore irregular in itself.

Hastings, in reply:—

We are not moving under that rule, but under the general jurisdiction of the Court, which has inherent power to set aside a wrongful service, which is an abuse of the process of the Court. Such a service cannot be treated as a nullity. The originating notice is a formal document purporting to be issued under the

(1) 8 Rep. Pat. Cas. 181, 190.
(2) 32 Sol. J. 324.
(3) 4th Ed. p. 1625.
(4) W. N. (1887) 192.
(5) 12 Q. B. D. 171.

authority of the Court, and to be certified to your Lordship with the sanction of the Chief Clerk, without which it could have had no existence, and it is a notice that an order for costs and damages may be made against the foreign company.

STIRLING, J.:—

This is an application on behalf of a foreign company named as respondents to a notice of motion which I will read presently, asking that the service of the notice of motion which was made on the foreign company in *Paris* should be set aside, and that the costs of the application may be ordered to be paid by the person who served the original notice of motion. The original notice of motion in question is one which is assigned to this branch of the Court by certificate. It is headed, "In the matter of the registered trade-marks Number 49,266 and three other marks of the company in question, and in the matter of the *Patents, Designs, and Trade Marks Acts*, 1883–1888." It proceeds: "Take notice that the Court will be moved, &c., on behalf of *Emily Saxlehner*, of *Buda-Pesth*, widow, trading as *Andreas Saxlehner*, that the register of trade-marks kept under the authority of the above-mentioned Acts may be rectified by removing therefrom the above-mentioned trade-marks, or that such further or other order may be made for the rectification of the register as to the Court may seem just." Then it is dated and signed by certain solicitors, and it is addressed to the Plaintiff company and the Comptroller-General of Patents, Designs, and Trade Marks.

I shall begin by considering what the effect of such a notice of motion would be if it were served on some one within the jurisdiction. It would be notice to a person within the jurisdiction, whether a foreigner or not, that the Court was going to be called upon to exercise the jurisdiction conferred on it by the *Patents, Designs, and Trade Marks Acts*, 1883–88, with regard to the rectification of the register. Now, what is the jurisdiction which is conferred on the Court by those Acts? [His Lordship read sect. 90 of the Act of 1883, and continued:—] The Court, therefore, is empowered on an application under the Act to make orders for payment of costs and to award damages.

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The service of this notice in accordance with the rules of the Court upon a person within the jurisdiction would, under Order LXVII., rule 5, be the basis of all subsequent proceedings with reference to the exercise of the jurisdiction of the Court, and in the exercise of that jurisdiction, by virtue of sect. 90, on the hearing of the application an order might be made with reference to costs. The Court, therefore, would have full power on the hearing of this motion (assuming it to have been brought against a person within the jurisdiction of the Court), if justice so required, to order that the costs, not merely of the applicants, but also of the Comptroller, who was a necessary party to the application by virtue of the rule, should be borne by the respondent, and as against any person within the jurisdiction of the Court the service of this notice would be ample to found the jurisdiction of the Court for making such an order.

Now, what has taken place here is this. The notice of motion has not been served in this country at all, but has been served in *Paris*, and no leave has been obtained from the Court to serve it. With reference to that I will read the observations of Lord Justice *Cotton* in *In re Busfield* (1): "Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from statute, a Court has no power to exercise jurisdiction over any one beyond its limits."

If, then, this is really service of a notice that the Court is about to exercise its jurisdiction, unless some statute authorizes it, it is entirely wrong, and an abuse of the process of the Court. But it is said that this is not really service of any document on which further proceedings are to be based, and could not be made the foundation for any further order against the person on whom it is served. If the person on whom it was served was within the jurisdiction, it could be made a basis of such proceedings. An order might be made, as I have pointed out, against him personally, for payment of costs. Why, then, is it

(1) 32 Ch. D. 131.

different as regards a foreigner? It may be that the Court, in the exercise of its jurisdiction, might take a different view with reference to the acts of a foreigner from that which it would take with reference to the acts of a person residing within the jurisdiction; but that is an observation which merely relates to the mode in which the jurisdiction would be exercised, and implies the existence of the jurisdiction. There are, however, further facts in the case which appear to me to shew that this cannot be treated simply as a notice, as is alleged, to the Respondents that something is going to be done which affects their interests. The document which is served is a formal document. It has been marked by the proper officer of the Court, in pursuance of Order v., rule 9, which provides that "Every cause or matter .... commenced in the Chancery Division shall be assigned to and marked with the name of one of the Judges," and clause (*c*) provides that: "Where the commencement is by notice of motion, such notice of motion shall be brought to the Writ Department of the Central Office, and it shall be the duty of the officer by whom originating summonses are issued to mark the same with the name of one of the said Judges, to be ascertained in manner aforesaid." Thus Order LXVII., rule 5, provides that service of the notice of motion shall be effected as nearly as may be in the mode prescribed for service of a writ of summons. What has been done with it? We are told by the affidavit that was made on behalf of the Applicant on the present motion that, on the 2nd of July, 1891, the notice was served upon him at the company's office in *Paris*.

And then he sets it out, and I have a copy of the document itself, upon which appears the following indorsement: "A true copy of this notice was served by me on the said company by handing the same," and so on. So that exactly the same process as would be adopted for the service of a writ has been taken. It seems to me that that was intended to be not merely a notice that something was going to be done which would affect the present Applicant, but that the jurisdiction of the Court was to be invoked as against the Respondents to that notice of motion exactly as if they had been resident within the jurisdiction. I think that Mrs. *Saxlehner* had no power to serve such a

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notice out of the jurisdiction. Further, I see no jurisdiction in the Court to give her leave to serve it; and certainly she has not attempted to get leave. Therefore, it seems to me that this service so effected in *Paris* is an abuse of the process of the Court and ought to be set aside. And I see no reason why on this occasion I should not order the costs to be paid by the person who has given rise to the difficulty—viz., Mrs. *Saxlehner*, on whose behalf the notice of motion was served.

Moulton, Q.C., subsequently on the same day applied *ex parte* that a day might be fixed for hearing the motion, and asked for the direction of the Court.

STIRLING, J.:—The name of the foreign company should be removed from the notice of motion as Respondents altogether. I shall fix some convenient day for hearing the motion as against the Comptroller, and you should send a copy of that notice of motion to the foreign company with an intimation that it is sent in order that they may be informed that proceedings are pending in this Court which may affect their interests.

Moulton, Q.C.:—Would sending the notice to Messrs. *Michael Abrahams, Sons & Co.*, the solicitors who appeared in Court to-day, be sufficient?

STIRLING, J.:—It is not a case for substituted service. I suggest that you should communicate directly with the company.

After some discussion the 31st of July was fixed for the hearing of the motion.

July 31. *Moulton*, Q.C., and *Grosvenor Woods*, for the Applicant, stated that the course directed by the Court had been followed.

Hastings, Q.C., and *Sebastian*, for the company:—Before appearing we shall require security for costs.

STIRLING, J.:—You are also out of the jurisdiction. Should it not be mutual?

After some further discussion the matter was ordered to stand over until the 2nd motion day in Michaelmas Sittings, the

company submitting to the jurisdiction, and security for costs (the amount to be settled in Chambers) to be given by both sides.

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Solicitors for the company: *Michael Abrahams, Sons & Co.*
Solicitors for Mrs. *Saxlehner: G. L. P. Eyre & Co.*

G. A. S.

EICHBAUM *v.* CITY OF CHICAGO GRAIN ELEVATORS, LIMITED.

STIRLING, J. 1891 *Aug.* 6.

[1891 E. 903.]

Company—Surrender of Shares—Issue of New Shares in Exchange—Power of Company to pass Special Resolutions—Preference Shares.

Although the *dictum* of *James*, L.J., in *Teasdale's Case* (1), that a company "may give itself power to purchase its own shares," was treated by the House of Lords in *Trevor* v. *Whitworth* (2) as going beyond the law, the decision in *Teasdale's Case* was not overruled or impeached by the decision in *Trevor* v. *Whitworth*.

By the memorandum and articles of association of a limited company the company was empowered to increase its capital by the creation of new shares, which might be issued with such preferential rights as to payment of dividends or repayment of capital, and generally on such terms as the company should by special resolution determine; and it was provided that, subject to any special resolution to the contrary, all new shares were to be offered to such members of the company as were entitled to receive notices from the company, in proportion to the existing shares held by them; and the directors of the company were empowered to accept surrenders of shares from any member of the company upon such terms as should be agreed upon:—

Held, following the decision in *Teasdale's Case*, that special resolutions authorizing the increase of the company's capital by the issue of new shares with preferential rights as to payment of dividends and repayment of capital, and empowering the directors to allot such new shares as fully paid up to any holder of ordinary shares in consideration of the surrender of an equivalent amount of fully paid-up ordinary shares, were not *ultrà vires* the company, provided that the surrenders were made *bonâ fide*, and not for the purpose of enabling any shareholders to escape liability.

THIS was an action by the holder of ten ordinary shares in the *City of Chicago Grain Elevators, Limited*, claiming a declaration

(1) Law Rep. 9 Ch. 54. (2) 12 App. Cas. 409.

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that it was *ultrà vires* of the company to allot any preference or other shares of the company, as fully or partly paid, to any holder of shares in the company in consideration of the surrender of an equivalent, or any other amount of fully or partly paid, ordinary, or other shares of the company; and claiming also an injunction to restrain the company from holding any meeting to pass or confirm any resolution authorizing the allotment of any shares for any such consideration, and an injunction to restrain the company and its directors, officers and agents, from allotting any shares for any such consideration.

The company was incorporated on the 30th of October, 1889, under the *Companies Acts* with a capital of £450,000, divided into 42,500 ordinary shares of £10 each, and 250 founders' shares of £100 each. By its memorandum of association the company had power to issue new shares, and it was provided by clause 7 thereof that "any new shares from time to time to be created may (but subject always, and without prejudice to the rights of the holders of the founders' shares) from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or of repayment of capital or both, or any such other special privilege or advantage over any shares previously issued, or then about to be issued (other than shares issued with a preference), or at such a premium, or with such deferred rights as compared with any other shares previously issued or then about to be issued, or subject to any such conditions or provisions, and with any such right or without any right of voting, and generally on such terms as the company may from time to time by special resolution determine." Articles 62 and 63 of the articles of association were as follows: Article 62. "The company may, from time to time, whether all the shares for the time being authorized shall have been issued, or all the shares for the time being issued shall have been fully called up, or not, by special resolution, increase its capital by the creation and issue of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the company, by the special resolution authorizing such increase, directs." Article 63: "Subject to any direction to the contrary that may be given by the special

resolution which authorizes the increase of capital, all new shares shall be offered to such members as are, under the regulations of these presents, entitled to receive notices from the company in proportion to the number of existing shares held by them." And by clause 7 of article 128 power was given to the directors "to accept from any member on such terms as shall be agreed a surrender of his shares or any part thereof."

The whole of the capital of the company had been issued; all its shares had been fully paid up, and some of them were held in *America*.

On the 30th of July, 1890, the directors issued a report stating that additional working capital and further borrowing powers were necessary for the company, and that it was desirable that a preferential position should if possible be obtained for the shareholders in the *United Kingdom*; and stating further that they had effected an arrangement with the American shareholders under which the holders of ordinary shares in the *United Kingdom* on the register on the 30th of July, 1891, were to have the right of exchanging their existing holdings for preference shares preferred as to capital, and entitled as from the 1st of June, 1891, to a cumulative preferential dividend of 6½ per cent. per annum, while any future overplus profits were, after payment of the preferential dividend, to be applied, first, in payment of a dividend to the 31st of May, 1891, of 6½ per cent. upon all the existing shares *pro ratâ*, and, subject thereto, were to be divided between the American shareholders and the holders of founders' shares.

The directors at the same time gave notice to the shareholders that the first annual general meeting of the company would be held on the 7th of August, 1891, for the purpose of receiving their report and sanctioning an increase of the amount they were authorized to borrow; and with the view of carrying out their arrangement they also gave notice that after the ordinary general meeting an extraordinary general meeting would be held for the purpose of considering, and if thought fit of adopting, the following resolutions: "(1.) That the capital of the company be increased by the creation of 25,700 new shares of £10 each; (2.) that the new shares be called preference shares, and that the holders thereof be entitled to a cumulative preferential dividend

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at the rate of 6½ per cent. per annum on the amount paid up thereon (such dividend to be calculated as from the 1st of June, 1891), but to no further share in the profits of the company; (3.) that in the event of the company being wound up the holders of the said preference shares shall be entitled to have the surplus assets of the company applied in the first place in repaying to them the amount paid up on the preference shares held by them respectively; (4.) that the said preference shares shall not be offered to the members in accordance with article 63 of the articles of association of the company, but shall be under the absolute control of the directors, who shall be at liberty to allot or otherwise dispose of the same to such persons on such conditions and at such times as they shall think fit, and, in particular, shall be at liberty to allot the same as fully paid to any holder of ordinary shares in the company, in consideration of the surrender by him of an equivalent amount of fully paid ordinary shares, and upon such terms as to payment of arrears of dividends on the shares surrendered and otherwise as the directors may think fit."

The Plaintiff then, in order to test the legality of the proposed arrangement, commenced this action, and now moved for (1.) an injunction to restrain the company from holding any meeting to pass or confirm any resolution authorizing the allotment of any preference or other shares of the company in consideration of the surrender of an equivalent or any other amount of fully or partly paid ordinary or other shares of the company; and (2.) an injunction to restrain the company from allotting any shares for any such consideration.

Buckley, Q.C., and *P. S. Stokes*, for the Plaintiff, in support of the motion:—

1. The issue or allotment of the proposed preference shares in consideration of the surrender of fully paid-up shares is *ultrà vires*, and the new preference shareholders, in the event of liquidation, run the risk of having to pay for them in full.

The resolutions either amount to an authority to the company to issue gratis shares which ought to be paid for in cash or in property, or else to an authority to it to buy its own ordinary

shares, and to give preference shares in exchange as the price of the purchase. A company cannot give itself power to purchase its own shares. The *dictum* of *James*, L.J., to the opposite effect in *Teasdale's Case* (1) was admitted by his Lordship himself in *Hope* v. *International Financial Society* (2), to have gone too far, and was overruled in *Trevor* v. *Whitworth* (3).

2. There is at present only one class of ordinary shareholders, and it is *ultrà vires* for the company to resolve that the rights of certain of those shareholders shall be altered and made to differ *inter se*, so that some of them shall be preferred and others deferred. In fact, these resolutions cannot be carried out unless and until every shareholder agrees to them.

[They also referred to *In re Almada and Tirito Company* (4).]

Hastings, Q.C., and *Carson*, for the company :—

The first objection taken to the resolutions is exactly covered by the decision in *Teasdale's Case*, which has never been overruled, and certainly was not intended to be overruled by the House of Lords in *Trevor* v. *Whitworth*. This is not a case in which the alteration is made to enable one set of shareholders to escape liability, or with any fraudulent or improper intent. There is nothing illegal or objectionable in a *bonâ fide* exchange of shares such as is here contemplated. This arrangement is not in the nature of a trafficking in shares ; nor of a purchase and sale of shares in the market ; nor of a purchase of shares which would amount to a reduction of capital, for there is no reduction either of nominal or of paid-up or of issued capital.

As to the second objection, the proposed issue of preference shares is in accordance with the memorandum and articles of association of the company, which contain express powers enabling the company to increase its capital by the issue of preference shares ; and the only preference between the shareholders will be one created under the powers of its own constitution.

Buckley, in reply.

(1) Law Rep. 9 Ch. 54.
(2) 4 Ch. D. 327, 336.
(3) 12 App. Cas. 409.
(4) 38 Ch. D. 415.

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STIRLING, J.:—

The object of this motion is to restrain the company from holding a meeting to confirm certain resolutions, and to prevent the directors from acting on them; and it is contended that the resolutions in question are *ultrà vires*.

It appears to me that the case falls exactly within *Teasdale's Case* (1). There 2000 £10 shares in a company had been issued, of which 901 (called in the proceedings X shares) had been fully paid up, and on the other 1099 (called in the proceedings A shares) £2 10*s*. per share had been paid. Special resolutions were duly passed that the X shares should be cancelled, and two shares of £10 each, with £5 per share paid thereon, given in lieu of each, and that the A shares should be cancelled, and one share of £10, with £5 paid, be given in lieu of every two of them. The essence of the transaction was, that the liability, whether under the old shares or under the new shares, remained practically unaffected. The company having afterwards been ordered to be wound up, the validity of that transaction was disputed by the official liquidator, and, with a view of raising the question, *Teasdale's Case* (being taken as a representative case) was brought before the Court. What Lord Justice *James* says in that case is this (2): "The liquidator seeks to put on the list of contributories a gentleman who has been off the register for many years, and who has been off it by virtue of resolutions which were intended to take effect by way of alteration of the articles of association, having been passed in the manner required by law for altering the articles, and duly sent up to the registrar accordingly. There was, by the articles as they stood after this alteration, a power in the directors to deal with two sets of shares in different ways. One set consisted of shares fully paid up, the other of shares on which £2 10*s*. only had been paid up. The holders of the first set were minded to have instead of them double the number of shares with £5 per share paid up. The holders of the other set were minded to have half the number of shares with £5 per share paid up. There is nothing in point of law to prevent such resolutions from being passed and carried into effect, if they are passed honestly and *bonâ fide*, not with a view to

(1) Law Rep. 9 Ch. 54. (2) Law Rep. 9 Ch. 58.

enable one set of shareholders to escape liability, nor with any other fraudulent or improper view." Therefore, the Lord Justice distinctly says that there is nothing to prevent resolutions for the exchange of shares, in the way which is pointed out there, being passed, provided it is done *bonâ fide*, and not to enable one set of shareholders to escape liability. Then he goes on to say: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." That is a *dictum* which, as the Lord Justice himself admitted in a subsequent case of *Hope* v. *International Financial Society* (1), went too far—at all events so far as it related to the purchase of shares—but he added it was not necessary for the decision of the case. It was, however, necessary for the decision of the case to come to a conclusion whether the resolutions that had been actually passed in that case were valid or not, and the decision was that they were valid. With that Lord Justice *Mellish* agreed. He said: "*Snell's Case* (2) and *Campbell's Case* (3) are direct authorities that where the articles authorize the surrender of shares, such a surrender is valid if made *bonâ fide* and with a view to the benefit of the company." Then, after discussing the articles and the resolutions, he says, as regards the resolutions, that they ought to be construed "as only intended to give power to the directors to accept surrenders of old shares and issue new shares in their stead"; and he says, "An article to that effect would have been valid." Therefore, Lord Justice *Mellish*, as well as Lord Justice *James*, to my mind, expresses a clear opinion that the transaction which was authorized by the resolution in that case was valid. Now, has that decision been impeached? I cannot find that there is anything in *Trevor* v. *Whitworth* (4), or in any of the speeches of the noble Lords who advised the House of Lords on that occasion, which shews any intention on the part of the House of Lords, or of any member of it, to treat *Teasdale's Case* (5) as overruled. No doubt, the *dictum* of Lord Justice *James* is referred to, and is treated (as the Lord Justice himself treated it) as going beyond what

(1) 4 Ch. D. 327, 336.
(2) Law Rep. 5 Ch. 22.
(3) Law Rep. 9 Ch. 1.
(4) 12 App. Cas. 409.
(5) Law Rep. 9 Ch. 54.

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was possible in law; but I am unable to find that there is any intention expressed of overruling *Teasdale's Case* (1); and Lord *Herschell*, in particular, who deals with the question of surrender, does not pretend to lay down the limits within which surrenders of shares may legitimately be made. He says (2) this: "If the surrender were made in consideration of any such payment, it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid." Therefore, in the one case, where there is a payment out of the funds of the company, it is bad; in the other case, where there is no payment, but a mere release, the company being in a position to forfeit the shares, it is valid. Then he adds: "There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield Silkstone Coal Company* (3): 'It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits.'"

I may add that the speeches delivered by the other learned Lords are not at variance with those observations.

I find, then, in *Teasdale's Case* an express decision of the Court of Appeal saying that surrenders made in circumstances almost precisely similar to those in the present case (the only difference being that there the shares exchanged were ordinary shares, and here old ordinary shares are exchanged for new preference shares) may be validly made.

It seems to me, therefore, that, so far as that ground is concerned, I am bound by the decision in *Teasdale's Case*, and that I must hold that this transaction is valid.

Then it is suggested that the carrying into effect of these resolutions will alter the relations of the ordinary shareholders *inter se*. It seems to me that there is this answer to any application for an injunction founded upon that reasoning. In the first place, the powers conferred by the memorandum and articles are being strictly pursued, so far as appears in the resolutions,

(1) Law Rep. 9 Ch. 54. (2) 12 App. Cas. 418.
(3) 17 Ch. D. 76, 85.

and, that being so, it does not seem to me that I ought in any way to interfere. Further than that, it is admitted that there is a way in which the transaction could be validly carried out, and until it is made manifest that the directors propose to carry it out in some way which is invalid (which at present I do not see), I think it would not be right that an injunction should be granted.

STIRLING, J. 1891 EICHBAUM v. CITY OF CHICAGO GRAIN ELEVATORS, LIMITED.

For these reasons, therefore, I refuse the motion.

Solicitors: *Parker, Garrett, & Parker; Paine, Son, & Pollock.*

W. W. K.

In re MASON. MASON *v.* MASON.

STIRLING, J. 1891 *May* 12, 13, 27; *July* 17; *Aug.* 7.

[1878 M. 318.]

Will—Accumulation of Income—Rebuilding and Repair of Buildings—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98) [*Revised Ed. Statutes, vol. iii., p.* 600].

A testator who was possessed (*inter alia*) of numerous freehold and leasehold messuages, and who died in 1870, by his will, after giving legacies and annuities to be paid out of the rents of his real and leasehold estate and the income of his general trust fund, bequeathed his pure personal estate upon trust for sale and conversion and payment of debts and legacies, and directed his trustees to invest the clear surplus to form the nucleus of a general trust fund. He then gave his real and leasehold estates upon certain trusts during the lifetime of the annuitants and the survivor of them, and directed the net rents and income of his real and leasehold estate and general trust fund to be applied (*inter alia*) in paying the ground rents of the leaseholds, and in keeping the freehold and leasehold messuages insured against fire and in tenantable repair, and in paying the annuities, and the clear surplus to be invested in augmentation of the general trust fund, declaring that any insufficiency in the insurance moneys received upon the destruction by fire of any building and the cost of rebuilding and substantially repairing any building should be made good out of the general trust fund. And he directed his trustees, after the death of the survivor of the annuitants, to sell his real and leasehold estate and hold the proceeds and the general trust fund upon trust for certain persons as tenants in common.

Twenty-one years after the testator's death, some of the annuitants were still living, several of the terms of years, for which the leasehold messuages were held, were still running, and the covenants in some of the leases had not been completely performed:—

Held, (1.) that the will amounted to an express direction for the

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accumulation of income; and, (2.) that upon the principle of *Vine* v. *Raleigh* (1) the trust for accumulation was valid, so far as it was a *bonâ fide* provision for the performance of the trusts for rebuilding, repairing, and reinstating the buildings; but that, subject to the due performance of such trusts, the trust for investment of the surplus income, after answering the purposes specified in the will, was invalid as from the expiration of twenty-one years from the testator's death.

ADJOURNED SUMMONS.

Jonathan Joseph Mason, by his will, dated the 7th of January, 1868, after bequeathing certain legacies and a number of annuities, which (subject to a subsequent provision) were to be paid out of the rents and profits of his real and leasehold estates and the income of his general trust fund, and were not to commence as to minors until they respectively attained twenty-one, bequeathed all his personal estate, except leaseholds, upon trust for conversion and payment of his debts, funeral and testamentary expenses and legacies, and then to invest the clear surplus in Consols to form the nucleus of a general trust fund. And the testator gave his real and leasehold estates upon trust during the lifetime of the annuitants and the survivor of them in case his pure personalty was insufficient to pay his debts and legacies, or the general trust fund was insufficient for the purpose of any works of rebuilding, reinstatement, or substantial repairs under the subsequent provisions of his will considered expedient, to sell a sufficient part of his leasehold estate to cover and make good the deficiency, and to invest any surplus proceeds in augmentation of the general trust fund. And upon trust to apply the net rents, profits, and income of his real and leasehold estate and the general trust fund in payment of the ground rents payable in respect of the leaseholds, and in keeping the freehold and leasehold messuages and buildings insured against fire and in tenantable repair, and in paying (amongst other things) the annuities aforesaid, and then to invest the clear surplus in augmentation of the general trust fund. And the testator declared that his trustees should have absolute discretionary power to determine (*inter alia*) what repairs were to be treated as substantial repairs for which provision was thereinafter made out of income or out of

(1) [1891] 2 Ch. 13.

capital, and that any insufficiency in the insurance moneys received upon the destruction or damage by fire of any building which his estate was liable to repair or rebuild should be made good out of the general trust fund, or if the same should be insufficient, by sale of a sufficient part of his leasehold estate. The testator further declared that after the death of the ultimate survivors of the annuitants under his will his trustees should sell his real and leasehold estates and hold the proceeds and the general trust fund in trust for certain persons as tenants in common.

The testator died on the 14th of January, 1870.

In 1878, proceedings for the administration of his estate were commenced by originating summons, on which an order on further consideration was made on the 2nd of July, 1881, whereby, amongst other things, a receiver was appointed.

On the 14th of January, 1891, the period of twenty-one years from the death of the testator expired. At that time several of the annuitants under the will were living (as was still the case), and it was contended on behalf of the heir-at-law and the next of kin of the testator, that the surplus income of his estate could no longer be accumulated.

This was a summons taken out by the Plaintiffs in the action, amongst whom were the heir-at-law and next of kin of the testator, asking (*inter alia*) that it might be declared that as from the 14th of January, 1891, the receiver's balances would (subject to the payment of the annuities), until the decease of the last survivors of the annuitants, be payable, as to so much of the surplus income as should arise from real estate to the heir-at-law, and as to so much thereof as should arise from personal estate to the next of kin of the testator, or their respective real or personal representatives.

It appeared that the testator was at the time of his death possessed of certain freehold messuages and about twenty leasehold houses held for terms of years, some of which had since expired, whilst others had various periods still to run, which amounted in two instances to upwards of forty-three years.

The other material facts are sufficiently stated in the judgment of the Court.

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Hastings, Q.C., and *John Henderson*, for the Plaintiffs:—

The provisions of this will amount to a direction to accumulate the surplus income of both realty and personalty after providing for the annuities; and a trust for the accumulation of income beyond the statutory period of twenty-one years from the death of the testator is void under the *Thellusson Act* (39 & 40 Geo. 3, c. 98). The only exceptions to this are (under sect. 2) provisions for the payment of debts, or the raising of portions, or touching the produce of timber. It is clear that this case does not come within the two last exceptions, and the only question is whether this amounts to a trust for the payment of the debts of the testator.

[STIRLING, J.:—Are there any debts?]

There are the liabilities of the testator under the leases held by him. But, to bring the case within this exception, it must appear that the *bonâ fide* and primary object of the accumulation was to make provision for the payment of the debts: *Mathews* v. *Keble* (1); and it cannot be said that this is so here: *Talbot* v. *Jevers* (2); *Weatherall* v. *Thornburgh* (3).

Grosvenor Woods, for the Defendant *C. C. Mason*, one of the executors of the will.

Christopher James, for another Defendant.

Fischer, Q.C., and *S. L. Bathurst*, for the persons entitled on the death of the surviving annuitant:—

This is in effect a provision made by the testator for the payment of his debts, and it falls within the first exception in the *Thellusson Act*, for under the expression "debts" must be included the liabilities of the testator under the leases which he held. It was held in *Bassil* v. *Lister* (4) that a direction to pay out of a testator's property the premiums on a policy of assurance effected by him on the life of another person is not an accumulation within the *Thellusson Act*, and the analogy between payment for such a purpose and pay-

(1) Law Rep. 3 Ch. 691.
(2) Ibid. 20 Eq. 255.
(3) 8 Ch. D. 261.
(4) 9 Hare, 177.

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ments to prevent the forfeiture of leases is close, and the principles applicable the same. A man may by his will provide for his debts generally, present as well as future, without contravening the *Thellusson Act*: *Viscount Barrington* v. *Liddell* (1); and a contingent liability, under a covenant not broken by a testator, is within the exception from the Act: *Varlo* v. *Faden* (2). But there is here no express direction to accumulate, and the statute does not apply to accidental accumulations: *Corporation of Bridgnorth* v. *Collins* (3); nor does accumulation necessarily take place by reason of the form in which the property is given: *Tench* v. *Cheese* (4).

But whatever may be the case as to the direction to invest the surplus income, the trusts for insuring the property and keeping the messuages and tenements in tenantable repair are valid, and the trusts for the rebuilding or reinstating of messuages and tenements are improvements, and outside the *Thellusson Act* altogether. The recent case of *Vine* v. *Raleigh* (5) is conclusive on this point.

Hastings, in reply.

STIRLING, J., said that as to the first point he considered that there was an express direction to accumulate; but before he could come to any decision upon the other part of the case he must be furnished with a statement shewing, as far as possible, what the liabilities of the testator's estate in respect of the leaseholds were; for it might be that some capital sums would have to be set apart for dilapidations.

This statement was furnished, and the case came on again on the 17th of July, 1891, when judgment was reserved without further argument.

1891. August 7. STIRLING, J. (after stating the facts, continued):—

It is admitted that the trusts for insuring the property, for the execution of tenantable repairs and so forth, are valid.

(1) 2 D. M. & G. 480, 498.
(2) 1 D. F. & J. 211.
(3) 15 Sim. 538.
(4) 6 D. M. & G. 453.
(5) [1891] 2 Ch. 13.

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Apart from any question as to the trusts and powers for the reinstatement of buildings, the execution of substantial repairs and rebuilding, it was hardly contested that the direction to invest the surplus income was invalid under the *Thellusson Act*. *Mathews* v. *Keble* (1) is an authority to that effect.

It is said, however, that the trusts for rebuilding, substantially repairing, and reinstatement are valid, and do not fall within the *Thellusson Act*. It is said that these are trusts in the nature of trusts for improvements such as have been held in the recent case of *Vine* v. *Raleigh* (2) to be good; or else that they constituted a provision for the payment of the debts of the testator, and were consequently valid within the decision in *Varlo* v. *Faden* (3). On the other hand, it was said that, assuming this to be so, still the trust was valid only if and so far as it constituted a *bonâ fide* provision for these purposes; and undoubtedly the testator cannot, under the guise of making provision for improvement or debts, do that which the Legislature has forbidden.

The real question which I have to decide is, what test ought to be applied in order to determine whether the provision for the purposes which I have mentioned is *bonâ fide* or not; and I think that in so far as accumulation would take place in a due course of the execution of the trusts and powers for the rebuilding, repairing, and reinstatement of the leasehold messuages, it is valid; but beyond this it is not. If, for example, at the end of the twenty-one years, during which accumulation is permitted by the *Thellusson Act*, it were found that the property was completely insured, and all the covenants in the leases completely performed, it would seem to me that the Court would not hold that a further accumulation was a due execution of the trusts and powers, if it were simply directed to making a provision against some possible future liability under the covenants which could not reasonably be expected to ripen into an actual debt. If the trust had been to invest the surplus income for the purpose of providing for the rebuilding, reinstatement, and substantial repairs of the property, and to pay so much of the surplus income as might not be required for that purpose to *A. B.*, I think that in the case which

(1) Law Rep. 3 Ch. 691. (2) [1891] 2 Ch. 13.
(3) 27 Beav. 255; 1 D. F. & J. 211.

I have just put the Court would direct the surplus income to be paid to *A. B.* Now, the *Thellusson Act*, though it does not invalidate trusts of the nature in question, gives them no greater force or efficacy than they had independently of the Act; and where in a due course of administration accumulation would not be sanctioned by the Court, I think the rights which arise under the Act ought to have effect given to them, otherwise it seems to me that there would be brought about a dry, unproductive accumulation by which no one benefits, and which it was the object of the Act to prevent.

In the present case the covenants in the leases have not been completely performed. It appears from the reports furnished that dilapidations to the amount of over £400 have to be provided for, the net income of the leasehold properties being now £500, the annuities amounting to £192, and there being payments to be made for ground rents, insurance, &c. The right order appears to me to be to the following effect:—

Declare, that subject to the due performance and execution of the trusts and powers of the will of the testator for rebuilding, reinstating, or substantially repairing the messuages and buildings in the said will mentioned, the trust for the investment of the clear surplus income of the testator's estate, after answering the several purposes in the said will specified, is invalid as from the expiration of the period of twenty-one years from the testator's death. Direct inquiries as to what sums ought to be expended (*a*) in keeping the testator's freehold and leasehold messuages and buildings insured from fire; (*b*) in keeping the said messuages and buildings in tenantable repair; and (*c*) whether any of the messuages or buildings, for the rebuilding, reinstatement, or repair of which the testator's estate is liable, ought to be rebuilt, reinstated, or substantially repaired, and if so what sums ought to be applied for such purposes.

Solicitors: *H. W. Christmas; Flegg & Son; Druces & Attlee.*

W. W. K.

Dictum of KEKEWICH, J., at p. 480, *applied. Re* HARVEY (*decd.*). [1950] 1 All E.R. 491.

KEKEWICH, J.

1891

July 14.

In re BYRON'S SETTLEMENT. WILLIAMS *v.* MITCHELL.

[1891 B. 118.]

Settlement—Power of Appointment—General Power—Words of Exception—Death of excepted Object—General Devise—Execution of Power—Wills Act (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii., p.* 35]—*Mortgage by Donee of Power—Equity of Redemption—Reservation of New Estate—Alteration of Original Limitations—Mistake.*

By a settlement of 1862 real estate, then subject to a mortgage in fee, was conveyed by *B.* to trustees, upon trust to permit her daughter *R.* (a married woman) to receive the rents for her separate use, and upon further trust "for such person or persons (not being her present husband, or any friend or relative of his), and for such estate or estates" as *R.* should by deed or will appoint; and, in default of appointment, then over. In 1868 *B.* and *R.*, by a deed containing no recitals, mortgaged the property in fee (subject to the prior mortgage), the proviso for redemption reserving the right of reconveyance to *R.*, "her heirs or assigns, or as she or they shall direct." In 1885 *R.*, her husband being then dead, made a will consisting of a general devise of all her real and personal estate in favour of a sister and her children:—

Held, that the power of appointment given to *R.* by the settlement of 1862 was not a power "to appoint in any manner she might think proper," within sect. 27 of the *Wills Act* (1 Vict. c. 26), and, therefore, was not exercised by her general devise:

Held, also, that the limitations in the settlement were not altered by the form of the proviso for redemption in the mortgage of 1868 so as to confer upon *R.* an absolute estate in fee simple.

Semble, a power of appointment by deed or will in favour of any person or persons "except *A.*," may become a general power through *A.* being dead at the time the power is exercised, and thus be exerciseable by a general devise under sect. 27 of the *Wills Act*.

ADJOURNED SUMMONS.

By a settlement of the 12th of April, 1862, certain freehold hereditaments, then vested in *Ann Byron*, widow, subject to a mortgage in fee to *John Colley* for £200 and interest, were conveyed by her to trustees in fee, upon trust to permit her daughter, *Mary Stephens Reynolds* (a married woman), to receive the rents for her sole and separate use, free from the control of her then present and any future husband, and upon further trust "for such

person or persons (not being her said present husband, or any friend or relative of his), and for such estate or estates as the said *Mary Stephens Reynolds* shall or may, notwithstanding her coverture, by any deed or other instrument in writing to be executed by her and attested by one or more witnesses, or by her last will and testament, direct, limit, or appoint"; and, in default of appointment, then upon certain trusts in favour of *Ann Williams* (another daughter of *Ann Byron*, the settlor), with an ultimate remainder to the right heirs of the said *Ann Byron*.

After the date of that settlement, *Mary Stephens Reynolds* expended a considerable sum of money in rebuilding one of the houses on the land so conveyed, and in repairing and improving other houses comprised in the deed.

By an indenture, dated the 7th of September, 1868, containing no recitals, the hereditaments comprised in the said settlement were conveyed by the said *Mary Stephens Reynolds* and *Ann Byron* to the said *John Colley* in fee (subject to the said mortgage debt of £200) by way of mortgage to secure the repayment by the said *M. S. Reynolds* to the said *John Colley* of £120 and interest; the proviso for redemption being, that on payment by the said *M. S. Reynolds* to the said *John Colley* of the £120 and interest, on the day therein named, the said *John Colley* should, at the request of the said *M. S. Reynolds*, her heirs, executors, administrators, or assigns, reconvey the said hereditaments "unto the said *M. S. Reynolds*, her heirs or assigns, or as she or they shall direct."

On the 30th of September, 1885, *Mary Stephens Reynolds*, her husband being then dead, made her will, disposing of all her estate in the following terms: "I give, devise, and bequeath unto my sister *Ann* all my real and personal estate during the term of her natural life, and then to be realized and divided between her sons *James* and *Charles Stephens*, her daughter *Mary*, and her granddaughter *Anne*, share and share alike." And the testatrix appointed two persons her executors and trustees.

At the time of her death, which happened on the 5th of October, 1885, *M. S. Reynolds* had real estate which passed by her will, other than that comprised in the settlement of 1862.

This was an originating summons raising two questions: first,

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whether *Mary Stephens Reynolds* had, under the settlement of 1862, a general power of appointment within sect. 27 of the *Wills Act* (1 Vict. c. 26), so that the general devise contained in her will operated, under that section, as an execution of the power; and secondly, whether, assuming that the power was not a general power, and therefore not executed by the will, the reservation in the mortgage of 1868 of the equity of redemption in favour of *Mary Stephens Reynolds*, "her heirs or assigns, or as she or they shall direct," effected a resettlement of the property upon her absolutely, freed from the restrictions of the previous settlement of 1862, so that the property would pass under her will. The first is the only point requiring to be reported at any length, the second being, as his Lordship held, fully covered by authority.

Blackmore, for the Plaintiff, a party interested under the trusts of the settlement of 1862, in default of appointment by *Mary Stephens Reynolds*:—

Upon the first point, I contend that the power in the settlement is not a general power, for the property is not real estate which the donee of the power has "power to appoint in any manner she may think proper," within sect. 27 of the Act. The conditions or limitations imposed by the settlement creating the power cannot be disregarded; and there is nothing in the Act prohibiting a settlor from imposing what fetters he chooses upon the disposition of the property he settles. Sect. 27 is not a prohibitory but an enabling section: *Phillips* v. *Cayley* (1). *Platt* v. *Routh* (2) may probably be relied upon as an authority that this is a general power. No doubt the power in that case was very similar in terms to the present; but the decision was under the *Legacy Duty Act* (36 Geo. 3, c. 52), and it was there held that in the case of an Act imposing duties it was necessary to do some violence to its language in order to carry out the object of the statute. But no such necessity arises upon the *Wills Act*, which should be read in its ordinary sense.

Upon the second point he referred to *Jackson* v. *Innes* (3) and *Heather* v. *O'Neil* (4) as authorities that the mere fact of the

(1) 43 Ch. D. 222, 232–3.
(2) 6 M. & W. 756.
(3) 1 Bli. 104, 114.
(4) 2 De G. & J. 399, 414.

reservation of the equity of redemption deviating from the original limitations did not of itself furnish sufficient ground for imputing an intention to change those limitations, but was rather to be ascribed to inaccuracy or mistake.

R. J. Parker, for parties taking under the will of *Mary Stephens Reynolds*:—

Upon the first point I submit that the power was well executed. There is no authority directly in point; but *Platt* v. *Routh* (1) is the nearest in favour of the view that there is a general power. The decision in that case was affirmed by the House of Lords in *Drake* v. *Attorney-General* (2), though without giving any reasons. *Edie* v. *Babington* (3) is an authority that a power such as this is a general power in the sense that it makes the fund which is the subject of the power assets for payment of the debts of the donee of the power.

On an examination of the language of the power there seems to be no sound reason why it should not be regarded as a general power. It is said that the generality is destroyed by the words in brackets. But, in the first place, the words "friend and relative" should be struck out as too vague. "Friend" is certainly too vague; and even supposing "relative" could be construed as "next of kin," it was impossible to say who constituted the husband's "next of kin" at the time the power was created, for he was then alive. Thus the "husband" alone remains; but he was dead when the power came to be exercised, so that his exclusion was inoperative, the power being in fact a general one at the time the donee proceeded to exercise it.

[KEKEWICH, J.:—You mean that a power which may at one time have not been a general power may, at the time the donee professes to exercise it, have become a general power by force of circumstances?]

Yes; sect. 27 of the *Wills Act* does not refer to a power given by a particular instrument, but to a power which the donee "may have"—that is, may have at the time he makes his general devise. I submit that where there is a power to appoint to

(1) 6 M. & W. 756. (2) 10 Cl. & F. 257.
(3) 3 Ir. Ch. Rep. 568.

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every one in the world except *A.*, or a class of persons, if *A.* or the class has ceased to exist at the time of its execution, then it becomes a general power, and as such exerciseable by a general devise under sect. 27.

Upon the second point he contended that full force should be given to the words of the reservation of the equity of redemption, and referred to *Anson* v. *Lee* (1); *Sugden* on Powers (2); *Whitbread* v. *Smith* (3); *Heather* v. *O'Neil* (4); *Atkinson* v. *Smith* (5); and *Jones* v. *Davis* (6).

Chubb, for a party interested both under *Mary Stephens Reynolds'* will and under the limitation over in default of appointment.

P. F. Wheeler, for the representative of the surviving trustee of the settlement of 1862, referred, upon the second point, to *Plomley* v. *Felton* (7), as shewing that the intention to alter the original limitations by the form of reservation of the equity of redemption must be collected from the instrument, and that no such intention could be collected from the mortgage of 1868, as it contained no recitals or anything indicating such an intention.

KEKEWICH, J.:—

Both points in this case are of some difficulty, and I have had the advantage of hearing a full argument upon them. The two points are entirely distinct, and might well be the subjects of two separate actions. The first arises upon the application of the 27th section of the *Wills Act*, which, in effect, enacts that a general power of appointment by will may be exercised by a general devise. This is not intended apparently to overlook or alter the distinction between property and power; but on the other hand it was intended to recognise what is familiar to all lawyers, namely, that a general power of appointment, though in technical character certainly different from property, is in substance and practice so nearly resembling it that injustice may

(1) 4 Sim. 364, 378.
(2) 8th Ed. pp. 277, 280.
(3) 1 Drew. 531; 3 D. M. & G. 727.
(4) 2 De G. & J. 399.
(5) 3 De G. & J. 186.
(6) 8 Ch. D. 205.
(7) 14 App. Cas. 61.

easily be done by preserving technical rules and insisting on their application. The Act interposes to prevent that injustice, and says in effect that a man who has a general power of appointment—that is, a power to dispose of property in any way he thinks fit—is really the owner in fee simple of the property the subject of the power, and, that being so, it is only right and fair that he should be at liberty to devise the property, and to exercise over it the right of ownership instead of exercising the power of appointment. That, in my opinion, is the effect of the Act.

Thus regarded, one understands without any difficulty the intention and meaning of the words, "which he may have power to appoint in any manner he may think proper." Anything less than a power to appoint as he thinks fit is not equivalent to ownership. A power so to appoint, but with an exception, is something less than proprietorship. A man is not any more the proprietor of land or money if he has power to appoint to all the world except to the children of *A.* than he is if he has power to appoint to the children of *B.* It is, in either case, a power of selection, not ownership; the appointor cannot deal with the property as he pleases. It seems to me to follow, therefore, that, subject to two remarks which I will presently make applicable to the particular language and the particular circumstances in this case, a power to appoint to such persons, not being the husband of the donee of the power or any friend or relative of his, is not a power to appoint in any manner the donee may think proper. It is a power to appoint in any manner the donee may think proper except in a particular manner which is specified; and, there being a specified exception, the generality of the power is gone.

But it is said that the exception here is too vague—is not sufficiently specific. That certainly cannot be said of the lady's husband who is excepted; but if that difficulty is avoided, as it is attempted to be in a way I will presently mention, then it is said that the exception of "any friend or relative of his" is too vague, and that it is impossible to give any meaning to it. That may be so: I am not now trying that question, which is one of construction. I cannot decide that there is no person who is excepted under the words "any friend or relative of his." I cannot

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decide that "relative" may not mean "heir" or "next of kin." I cannot decide that "friend" may not point to some definite person who, upon the question being tried, may be excepted from the power so as to make his exception from the power a particular and special exception. I must, therefore, upon the materials now before me, hold that there is an exception from the power by virtue of those words.

But supposing these words were out of the way, it is argued that the words "not being her present husband" would have no force in this particular instance, because the power was exercised after the death of the husband, when the lady was a widow, and, therefore, it had no effect upon the execution of the power; that at the date at which the power was exercised, it was a power to appoint in favour of any person in the world except one, who was a non-existent person, and that therefore the exception did not in fact have reference to any person at all. That was the argument; and, as at present advised, I think the argument is a sound one. I see no reason why a general power originally limited by exception may not become a general power free from exception by subsequent events. I do not see why a power to appoint to all the world except *A.*, *B.*, and *C.*, may not be a power to appoint to all the world if, when the power comes to be exercised, *A.*, *B.*, and *C.* are dead. If I am right in principle as to the distinction between power and property, that seems to me to follow, and to that extent I can adopt Mr. *Parker's* close and well-reasoned argument. But I am not dealing with that alone. There are attached to that exception the words "or any friend or relative of his." I cannot adopt the argument that those words are so vague that I must reject them altogether.

With regard to the case which was cited, of *Platt* v. *Routh* (1), that was not a case arising on this particular section of the *Wills Act*, but was a case arising under the *Legacy Duty Act*; it was argued from an entirely different point of view from that in the present case, and not with regard to the particular object of the section I have now to consider.

Then there was an Irish case cited by Mr. *Parker*—*Edie* v.

(1) 6 M. & W. 756.

Babington (1)—which dealt with another aspect of general powers, namely, the effect which an exception has in making the property liable to the debts of the donee of the power. That seems to me to be outside the present case, and I think it would be unsafe to rely on such an authority here.

Upon the construction of the Act, and upon principle, it appears to me that we have here a power not general—that is to say, it is not a power to appoint "in any manner" the donee may think proper, but it is a power to appoint "in any manner" with an exception, which exception destroys the generality of the power.

Upon the second point, as to the effect of the reservation of the equity of redemption in the mortgage of 1868, his Lordship held that the case was covered by the observations of Lord Justice *Turner* in *Heather* v. *O'Neil* (2), and of Lord *Macnaghten* in *Plomley* v. *Felton* (3); that in the present case there were no peculiar circumstances or any indication of intention to alter the original limitations in the settlement of 1862; that there had been merely an inaccuracy or mistake in the form in which the equity of redemption had been reserved, and that the real intention was that the equity of redemption should follow the original limitations in favour of Mrs. *Reynolds*, including her power of appointment.

His Lordship concluded:—I am, therefore, of opinion that the power of appointment given by the settlement of 1862, was not a general power, and not such a power as could be exercised by a general devise under sect. 27 of the *Wills Act*; and that Mrs. *Reynolds*' interest and power under the settlement were not altered by the language of the proviso by which the equity of redemption was reserved in the mortgage of 1868. Accordingly Mrs. *Reynolds* has not exercised the power, and her will is inoperative with regard to the property in question.

Solicitors: *Barlow & James*, agents for *R. T. Griffiths, Hay; Smiles & Co.*, agents for *Page & Fossick, Hay; A. B. Chubb; Crowders & Vizard.*

(1) 3 Ir. Ch. Rep. 568. (2) 2 De G. & J. 399, 414.
(3) 14 App. Cas. 61, 65, 66.

KEKEWICH, J.

1891

July 15.

In re THOMAS. WOOD *v.* THOMAS.

[1891 T. 771.]

Tenant for Life and Remainderman—Enjoyment of Income in Specie—Gift of Securities "for the time being constituting or representing Residuary Personal Estate"—Absolute discretionary Power to Trustees to retain Investments.

A testator by his will gave his residuary estate to trustees upon trust for conversion, and investment of the proceeds in specified securities, with power to the trustees in their absolute discretion to retain any securities or property belonging to him at his death unconverted, for such period as they should think fit, and declared that his trustees should stand possessed of "the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects thereinbefore bequeathed, and of the income thereof," upon trust to pay the income to certain persons for life with remainders over.

The estate of the testator comprised certain American bonds, which were not included among the securities authorized by the will as investments, but were retained by the trustees in exercise of the discretion given to them. These bonds, which bore interest at 6 per cent., were redeemable at par at a future date, and their present market value was considerably above par:—

Held, that the tenants for life were entitled to the whole net income of the bonds so retained.

Adjourned summons.

George Thomas, who died on the 4th of September, 1890, by his will, dated the 29th of May, 1886, after directing payment of his debts and funeral and testamentary expenses, and specifically devising and bequeathing certain real and personal estate, devised all the rest of his real estate, including leaseholds, and bequeathed all his moneys and securities for money, shares in public companies or in ships, and all other his personal estate and effects whatsoever, to his trustees and executors therein named, upon trust that they should receive, collect, and get in all the said residuary personal estate and effects, and should, at such time or times and in such manner as they should think fit, sell, dispose of, and convert into money such part thereof as should not consist of money, or some or one of the stocks,

funds, shares, or securities thereinafter authorized as investments, and which he or they should think proper to retain, and the testator declared that it should be lawful for his trustees or trustee in their or his absolute discretion to retain any securities or property which should belong to him at his decease, unconverted and in the state of investment or security in which the same should then be, for such period or periods as they or he should think fit, without being answerable for any loss which might be occasioned thereby. And he further declared that his said trustees or trustee should, with and out of the moneys which should arise from the sale, disposition, and conversion thereinbefore directed, and the moneys which should belong to him at his decease, in the first place, pay all his just debts and funeral and testamentary expenses, and should lay out and invest the residue of the said moneys in their or his names or name, or under their or his legal control, in or upon any of the public stocks, or funds, or Government securities of the *United Kingdom*, or of the Empire of *India*, or of any British colony or dependency, or upon real securities in *England* or *Wales*, and not elsewhere, or in or upon the mortgages, bonds, debentures, or debenture, guaranteed, or preference stock or shares of any corporation, company, or public body in the *United Kingdom*, with power from time to time, at the discretion of his said trustees or trustee, to vary such investments, and also the investments of any stocks, funds, shares, or securities which should belong to him at his decease and be retained unconverted, into or for others of any nature thereby authorized. And he declared that his said trustees or trustee should stand possessed of "the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects" thereinbefore bequeathed, "and of the income thereof," upon trust to divide the said stocks, funds, shares, and securities constituting or representing the said residuary estate into six equal parts or shares, and to pay the income of such shares to certain persons specified during their respective lives, with remainder, as respects certain of the shares, to other persons for life, and, subject to the trusts thereinbefore contained, he directed that his trustees or trustee should

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stand possessed of all the stocks, funds, shares, and securities constituting and representing the residuary estate and effects thereinbefore bequeathed, upon trust for his nephews and nieces in manner therein mentioned.

The testator's residuary personal estate comprised certain American railroad and foreign bonds, which were liable to be paid off at their par value at future dates, and the present value of which in some instances exceeded the par value, *ex. gr.* (*inter alia*) bonds to the value of $5000, of the *Philadelphia and Reading Railroad*, bearing interest at 6 per cent., and redeemable on the 1st of June, 1911, at par, and of which the market price was £123 to £125 per cent.

This summons was taken out by two of the executors of the will, who were also beneficiaries, against the other beneficiaries and the other executor, asking for the determination of several questions arising under the will, and, in particular, in what manner the income of the securities or property held by the testator at his death, and not within the investment clause in his will, pending the conversion thereof, ought to be applied and dealt with.

Vernon Smith, for the Applicants.

Upjohn, for some of the tenants for life :—

Where there is a power to trustees to retain investments the tenant for life is entitled to the full income of the investments retained, unless they are of a wasting or terminable character : *In re Sheldon* (1) ; *Porter* v. *Baddeley* (2). The principle is that the testator, by conferring the power of retention, has in effect enlarged the class of authorized securities.

[KEKEWICH, J., referred to *Green* v. *Britten* (3).]

The same principle is recognised in *Gray* v. *Siggers* (4).

[KEKEWICH, J. :—The only question in that case was whether the trustees could retain investments. It did not raise the question whether the tenant for life was to have the full income.]

(1) 39 Ch. D. 50.
(2) 5 Ch. D. 542.
(3) 1 D. J. & S. 649.
(4) 15 Ch. D. 74.

But the Vice-Chancellor seemed to consider that if he held the trustees might retain, it would follow that the tenant for life would receive the full income.

[He referred also to *Brown* v. *Gellatly* (1), *Meyer* v. *Simonsen* (2), *Re Llewellyn's Trust* (3), and *Simpson* v. *Lester* (4).]

Christopher James, for other tenants for life :—

The principle to be applied is, that the Court must consider, first, whether the trustees have an uncontrolled power to retain investments; and, secondly, whether there is a direction that the tenant for life is to enjoy the income of the retained investments. Both these conditions are fulfilled here. What is here given to the tenants for life is the income of the "stocks, funds, shares, and securities constituting or representing the residuary estate"—a description which clearly comprises the retained investments. The case is similar to *In re Chancellor* (5).

George Henderson, for a tenant for life in remainder, took no part in the argument.

Ashworth James, for the remaindermen :—

The principle to be deduced from the cases is that a mere power to retain securities does not imply any variation of the rights of successive takers. In order that a tenant for life should be entitled to enjoyment in specie of the income of retained investments, there must be a clear intention to that effect expressed in or to be implied from the words of the will. It may be conceded that in this will the words "stocks, funds, shares, and securities for the time being representing the residuary estate" extend to the retained securities; but these words do not assist the interpretation of the word "income" on which alone the question depends. The rule in *Brown* v. *Gellatly* and *Meyer* v. *Simonsen* applies, and the tenants for life are only entitled to interest at 4 per cent. on the capitalized value of the securities in question.

(1) Law Rep. 2 Ch. 751.
(2) 5 De G. & Sm. 723.
(3) 29 Beav. 171.
(4) 4 Jur. (N.S.) 1269.
(5) 26 Ch. D. 42.

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1891

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KEKEWICH, J.:—

I am not prepared to hold that where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention necessarily gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion. I believe that so to hold would be against the law as laid down in many cases and many text-books, and against the practice of conveyancers, who, I believe, have invariably provided for the rents and profits of property given in trust for sale being paid to the tenant for life where that was intended, and I think that no such doctrine receives any support from the decisions of Mr. Justice *North* in *In re Sheldon* (1) and Lord *Cairns* in *Brown* v. *Gellatly* (2). I do not think either Mr. Justice *North* or Lord *Cairns* intended to decide, or did decide, any abstract question of the kind. But I have no doubt that one looks out with an expectant eye for a direction that the tenant for life shall receive the income, when there is an express direction to the trustees to retain securities, or any indication of the testator's intention that they shall retain indefinitely for so long as they may think fit. On the other hand, I do not think that any Judge has intended to hold that it is inconsistent with a settlement on certain persons for life, and afterwards to others in remainder, that the income should, by reasonably plain words, be given in specie; and I do not think the case of *Porter* v. *Baddeley* (3) really has any application to a case like the present, because there there was no trust for conversion, and the remarks of the Vice-Chancellor dealt with the facts in the absence of the trust for conversion, and referred to investment in terminable annuities, securities of a wasting character coming within the rule which is known as the rule in *Howe* v. *Earl of Dartmouth* (4), and other rules applicable to the administration of personal estate.

In this particular instance it seems to me, now that I have had the advantage of hearing the authorities cited and the arguments

(1) 39 Ch. D. 50.
(2) Law Rep. 2 Ch. 751.
(3) 5 Ch. D. 542.
(4) 7 Ves. 137.

on the construction of the will, that this case is an example of that class of which *In re Sheldon* (1), and also *Green* v. *Britten* (2), to which I called Mr. *Upjohn's* attention as being conveniently compared with *In re Sheldon*, are instances. In *Green* v. *Britten* the Lord Justice *Turner* came to a conclusion from the words of the particular will, and I think I must consider that Mr. Justice *North*, in *In re Sheldon*, also came to a conclusion on the words of the particular will, no doubt looking, as I have ventured to say, with an expectant eye for the direction, and finding it without much difficulty. I have no difficulty in finding it here. The testator directs his trustees to convert everything—a direction as absolute as it is possible to conceive; and then he gives an equally absolute discretion to his trustees to retain securities. Mr. *Upjohn's* argument is that the securities which are retained come within the authorized securities, and that view is countenanced and supported by the language of Lord *Cairns* in *Brown* v. *Gellatly* (3). But I do not think that that will carry you far enough; I think you must find a direction that the tenant for life shall enjoy in specie. The mere fact that it is authorized is not, standing alone, sufficient. But what the testator does here is this. Having directed conversion, and having directed payment of his funeral and testamentary expenses, and investment of the residuary moneys, and having also sanctioned retention at the discretion of the trustees, he says: "I declare that my trustees or trustee shall stand possessed of the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects hereinbefore bequeathed and of the income thereof." Now, of what are they to stand possessed? Of the stocks, funds, shares, and securities —not only of those which they have converted, but surely also of those which they retain. Otherwise the retained securities are not dealt with at all. There seems to me to be no alternative. Either he here is declaring trusts of the stocks, funds, shares, and securities which for the time being are retained, and which therefore for the time being constitute or represent a portion of the personal estate, or if he is not, then there is no gift of those

(1) 39 Ch. D. 50. (2) 1 D. J. & S. 649.
(3) Law Rep. 2 Ch. 751.

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retained securities at all. I made some observations in which I was perhaps a little severe as to the mode in which this will was drafted; but it seems to me here in this particular instance, when one comes to look closely into it, and that is the test of good drafting, it bears the test surely and well, and there is a distinct gift of the income of what the trustees hold for the time being, including that which in their discretion they retain.

Solicitors: *Bell, Brodrick, & Gray; Burton, Yeates, Hart, & Burton.*

C. C. M. D.

KEKEWICH, J. 1891 *July* 17.

MANDER *v.* FALCKE.

[1891 M. 1235.]

Practice—Motion to Commit—Irregularity—Substituted Service—Service on Solicitor—Personal Service—Motion to Attach—Appearance of Defendant Waiver of Objection to Motion.

Notice of motion to commit a defendant must be served upon him personally, if practicable, service upon his solicitor being insufficient; and the Court will not make an order for substituted service until it is satisfied that every endeavour has been made to effect personal service. Mere knowledge on the part of the defendant of the plaintiff's intention to move to commit does not dispense with the necessity of endeavouring to effect personal service; and the appearance of the defendant upon the motion is not a waiver of any objection on his part on the ground either of want of personal service or of any irregularity.

THIS was a motion on behalf of the Plaintiffs to commit the Defendant, *George Edward Hinde*, to *Holloway Prison* for alleged breaches of an order made by Mr. Justice *Kekewich* on the 8th of May, 1891, and of the order of the Court of Appeal made on the 3rd of June, 1891, affirming that order (1). The notice of motion was dated the 6th and given for the 10th of July, 1891.

On the motion being opened, a preliminary objection was taken on behalf of the Defendant, *G. E. Hinde*, that no order could be made upon it, on the ground that the Defendant had not been personally served with the notice of motion, or that, if there had been personal service, it was irregular, there not

(1) [1891] 2 Ch. 554.

having been "two clear days" between the service and the day fixed for hearing the motion, as required by the Rules of Supreme Court, 1883, Order LII., r. 5. From the affidavits in support of the motion it appeared that on the 6th of July, 1891, the Plaintiffs' solicitor served the Defendant's solicitor with the copies of the notice of motion and affidavits; that subsequently attempts were made to serve the Defendant personally, but without success, until the 9th of July—that is, the day before that on which the motion was to be heard—when the Plaintiffs' solicitor succeeded in effecting personal service.

The Plaintiffs charged the Defendant with having adopted various means to evade service.

Oswald, for the Defendant *G. E. Hinde*, in support of the preliminary objection:—

First, the service of the notice of motion on the Defendant's solicitor was insufficient. It is the settled rule of practice that a notice of motion to commit must be served upon the defendant personally: *Ellerton* v. *Thirsk* (1); *Angerstein* v. *Hunt* (2); *Hope* v. *Carnegie* (3); *Nelson* v. *Worssam* (4). And in *Nelson* v. *Worssam* it was held that the appearance of the defendant on the motion was not a waiver of the objection that he had not been served personally. The statement in the "Annual Practice," 1890–1 (5), that appearance is a waiver, is erroneous, and *Harvey* v. *Hall* (6), which is there referred to as the authority for that proposition, in no way supports it. Although the distinction between attachment and committal has been for most purposes abolished—*Callow* v. *Young* (7)—yet the practice appears to be that a notice of motion for attachment may be served on the defendant's solicitor, but that a notice of motion for committal must be served on the defendant personally. In *Callow* v. *Young*, in which I was counsel, the notice of motion for attachment was served on the solicitor; but on being turned into a notice of motion to commit, it had to be served on the defendant personally. Then, in the second place, there has not

(1) 1 Jac. & W. 376.
(2) 6 Ves. 488.
(3) Law Rep. 7 Eq. 254.
(4) W. N. (1890) 216; L. J. Notes of Cases, 1890, p. 151.
(5) Page 732.
(6) Law Rep. 11 Eq. 31.
(7) 56 L. T. (N.S.) 147.

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been the "two clear days" required by Rules of Supreme Court, 1883, Order LII., r. 5, between the actual personal service on the Defendant and the day named in the notice for the hearing of the motion, and no special leave was obtained to dispense with the two clear days.

Warmington, Q.C., and *Gatey*, for the Plaintiffs:—

We admit that the personal service in this case was irregular. But there is no absolute rule that personal service of a notice of motion to commit is necessary. Personal service is no doubt best, but personal knowledge is sufficient. In the older cases cited as authorities for personal service, there was no knowledge. Under the circumstances, and as it is clear that the Defendant has been endeavouring to evade service, we submit that the service on his solicitor, coupled with personal knowledge on the part of the Defendant himself, was sufficient, and we ask your Lordship to treat it as good substituted service: *In re A Solicitor* (1); *Jonas* v. *Long* (2). We did our best to effect personal service, and, the Defendant having now appeared in obedience to that service, he cannot complain of the irregularity. He need not have appeared at all: in which case we should, no doubt, have been in a difficulty; but, having appeared, he cannot now insist on the objection.

Oswald, in reply:—

It was misleading, first, to serve the solicitor, and then to serve personally. The Plaintiffs' own proceedings shew that they abandoned the service on the solicitor. The Defendant does not waive the objection by appearing; he appears in order to take the objection; and in a matter affecting the liberty of the subject that is all he can do; he cannot take the objection earlier. Serving a short notice of motion without leave is clearly irregular. If special leave has been given, it must be so stated in the notice of motion: *Dawson* v. *Beeson* (3). *In re A Solicitor* was a case of motion to issue a writ of attachment, in which service on the solicitor is admissible. *Jonas* v. *Long* does not apply. There the question was as to the mode in which the Court would

(1) 14 Ch. D. 152. (2) 31 Sol. J. 717, 727.
(3) 22 Ch. D. 504.

direct substituted service on a special application for that purpose; but I rely on your Lordship's observation there that the Court must be very strict in matters affecting the liberty of the subject. Substituted service must be specially asked for, and will not be allowed until every attempt has been made to effect good personal service. Here the Plaintiffs have abandoned their service on the solicitor by trying to effect a personal service on the Defendant which was bad because they had not obtained leave to serve short notice of motion.

KEKEWICH, J.:—

It is not to be regretted that this point has been raised and argued, because it has not been discussed much of late years; and, on the other hand, there has of late years arisen a confusion between committal and attachment, which perhaps has led to some misapprehension as to the practice in regard to the former class of cases.

We are indebted to Mr. Justice *Chitty* for information of the views of the late Master of the Rolls (Sir *George Jessel*), upon the question whether any distinction is to be made between attachment and committal. In *Harvey* v. *Harvey* (1) Mr. Justice *Chitty* says (2), that "in a case of *Sprunt* v. *Pugh* (3), on a motion against a receiver, in which I myself was counsel, the late Master of the Rolls (Sir *G. Jessel*), stated his opinion, though it does not appear in the report, that the distinction between committal for contempt and attachment for contempt was practically abolished." And then the learned Judge goes on to describe what the distinction between committal and attachment formerly was. He says: "The distinction between an order for committal and an attachment for contempt was formerly considered to be, that committal was the proper remedy for doing an act prohibited by injunction or the like, whereas attachment was the remedy for neglecting to do some act ordered to be done."

Here, therefore, the notice of motion is properly framed for committal. According to the rule, committal is the appropriate remedy; but I do not think it can be said that, according to the

(1) 26 Ch. D. 644. (2) 26 Ch. D. 654.
(3) 7 Ch. D. 567.

KEKEWICH, J. 1891 MANDER v. FALCKE.

modern practice, a motion for attachment would be wrong; yet it may be that, according to the modern practice, what is sufficient service of the notice of motion in the one case is not sufficient service in the other. Why that should be, I do not pretend to know or guess; I assume there is some ground for it; but that there has been some distinction I have no doubt; and in matters of practice even more than in matters of law—I am only repeating what I have often said before—it is more important that practice should be uniform and certain than that it should be right. This is important with regard to law, but still more important with regard to practice.

The rule in Lord *Eldon's* time was that there must be personal service of a notice of motion to commit. It is not laid down anywhere that you cannot have an order for committal without personal service of the notice of motion; but the Court will not allow the order to go until it is satisfied that every endeavour has been made to effect personal service. I do not find any rule so laid down in terms in the General Orders; but that was certainly the rule of practice in Lord *Eldon's* time, and it is within the recollection of many of us that it was a rule of the old Court of Chancery. The authority of Vice-Chancellor *Stuart* has been cited to the same effect; and I remember a case in which, as counsel, I endeavoured to obtain an order for committal from the same learned Judge without personal service but he refused it on that very ground. This, then, was the rule of practice down to modern times. Then there crept in, it was said, a difference of practice; but that was challenged by Mr. Justice *Stirling* in *Nelson* v. *Worssam* (1). There Mr. Justice *Stirling* referred to *Ellerton* v. *Thirsk* (2), which is the main authority for the necessity of personal service of a notice of motion to commit; and upon counsel asking whether this was consistent with the modern practice, the learned Judge asked "When has it been altered?" That question challenged the practice, and no answer was given to it. But counsel went on to argue that the object of requiring personal service was to satisfy the Court that the defendant was informed of the proceedings

(1) W. N. (1890) 216; L. J. Notes of Cases, 1890, p. 151.
(2) 1 Jac. & W. 376.

against him, and that the defendant, if he appeared, could not object that he had not been personally served. The question, however, in that case as in this, was one of practice, and I find no authority for altering what is the settled practice, and I do not think a Judge of first instance ought to attempt to alter it.

Then the notice of motion in this case was given admittedly not at the proper time. I have not the slightest hesitation in holding that appearance is not a waiver of an objection on the ground of irregularity in a case affecting the liberty of the subject; but I am not quite clear as to what ought to be done in this case. In another case before me, an order for committal was made and was upheld by the Court of Appeal, notwithstanding the absence of personal service of the notice of motion. When the application comes before me in this case to dispense with personal service, I will consider it. Such an application must necessarily be *ex parte*, and I shall not have the advantage of Mr. *Oswald's* assistance. I will not prejudge such an application one way or the other, except so far as to say that it would be impossible and inconceivable, and contrary to common sense and justice, that a man who has rendered himself liable to committal should ultimately be able to evade it by keeping out of the way.

At present, I must hold that Mr. *Oswald's* preliminary objection is good.

I refuse the motion, but make no order as to costs.

Solicitors: *Ellis, Munday, & Clarke; T. Dyson.*

G. I. F. C.

KEKEWICH, J.

1891

July 22.

In re OWTHWAITE. OWTHWAITE *v.* TAYLOR.

[1891 O. 448.]

Trust Funds—Investment—Annuity—Appropriation—Power to vary Investments—Trust Investment Act, 1889 (52 & 53 *Vict.* c. 32), *ss.* 3, 6.

The power given to trustees by sect. 3 of the *Trust Investment Act*, 1889, to invest trust funds in any of the stocks therein mentioned, does not extend to authorizing them to set apart or appropriate any of such stocks to answer a particular purpose, as, for instance, to provide for an annuity given by will, so as to facilitate the distribution of the rest of the testator's estate.

Quære, whether such an object can be effected under the power of varying investments given at the end of sect. 3, that power being applicable to any investments, whether made under the Act or not: *In re Dick* (1).

JAMES OWTHWAITE, who died in 1887, by his will, dated in 1886, after appointing his cousin, *Robert Arthur Owthwaite*, and *Henry Ramsay Taylor* his executors and trustees, and bequeathing certain legacies, devised and bequeathed his residuary real and personal estate to his said trustees in trust for sale and conversion, and to invest the net proceeds "in any of the Parliamentary stocks or funds of *Great Britain*, or on Government or real or long leasehold securities in *England* or *Wales*." And he declared that his trustees should stand possessed of the said investments, upon trust in the first place to pay his son *James Owthwaite* an annuity of £100 a year for his life, or until alienation or bankruptcy as therein mentioned, in which event the trustees were empowered in their absolute discretion, to apply the annuity, or any part thereof, towards the maintenance and support of his said son; and the testator then proceeded as follows: "And I direct the trustees or trustee to set apart, when and as soon as to the trustees or trustee seem fit, and invest in their or his names or name, in any of the investments in which the proceeds of sale and conversion of my estate is hereby authorized to be invested, a sum of money, the income whereof, when invested, shall be sufficient at the time of investment to pay the same annuity, and to pay the

(1) [1891] 1 Ch. 423.

same accordingly, with power to resort to the capital of the appropriated fund whenever the income of the same shall be insufficient; and until such sum shall be appropriated, I charge my residuary estate with the said annuity." And subject to the said annuity the testator directed his trustees to stand possessed of the appropriated fund, or so much thereof as should not be resorted to in order to make up any deficiency of income, upon trust for such persons as his said son should by will appoint; and in default of appointment the appropriated fund, or the unapplied part thereof, was to fall into the testator's residuary estate. Then the testator directed that, subject to the legacies, trusts, and powers aforesaid, his residuary estate should be held in trust for the said *Robert Arthur Owthwaite* absolutely. The will contained no power to vary investments. By a codicil the testator increased the annuity to his son to £250, and directed that his will should be read as though the annuity of £250 was therein written in the place of the annuity of £100, and that all the provisions and restrictions attached by his will to the annuity of £100 should attach, apply, and be applicable to the increased annuity, and that all the discretionary powers vested in and directions given to his trustees by his will should be applicable to the increased annuity and exerciseable by the trustees as though the same were written and repeated in his codicil.

This was an originating summons taken out by *Robert Arthur Owthwaite*, one of the trustees and residuary legatee, against the other trustee and *James Owthwaite*, the son, raising, among other questions, the question whether, under the powers of investment given to trustees by the *Trustee Investment Act*, 1889, the trustees had power to appropriate a sufficient sum of *India* 3½ per Cent. Stock—when purchased under the powers of the Act—as a fund to answer the annuity of £250.

Marten, Q.C., and *J. W. Williamson*, for the Plaintiff:—

It is clear that, under sect. 3 (*d*) of the *Trust Investment Act*, 1889, the trustees may invest in *India* 3½ per Cent. Stock, such an investment not being "expressly forbidden" by the will. Under sect. 6 the Act applies to trusts created before, as well as after, the passing of the Act, and the powers of the Act are to

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be in addition to the powers conferred by the will. Then we submit that, as the trustees may invest in *India* stock, they are equally entitled to appropriate it for the purpose of the annuity. It is true, the Act does not in terms authorize appropriation, but the Court should give a liberal interpretation to the Act: *In re Dick* (1). The words "hereby authorized" may be read as "hereby or by any Act of Parliament authorized," the Act being read into the will (2).

Fossett Lock, for the Defendant trustee, *H. R. Taylor*.

Warmington, Q.C., and *Mulligan*, for the Defendant *James Owthwaite*, the annuitant:—

Supposing the power of "investment" given by the Act does not extend to appropriation, possibly the same result may be attained under the power to vary investments given by the last words of sect. 3—a power which is imported into the will: *In re Dick*.

KEKEWICH, J.:—

I entirely follow Mr. *Marten's* view that the *Trust Investment Act*, 1889, is so far applicable to this will that the trustees have power to invest in any of the securities mentioned in that Act. There is no express prohibition in the will; and, in the absence of an express prohibition, the powers given by the statute apply to this will. I also follow Mr. *Marten's* argument in this, that according to the decision of the Court of Appeal in *In re Dick*, a liberal interpretation is to be put upon this Act. This does not mean that the Court is to strain the language of the Act, or to construe it otherwise than according to the proper meaning of the English language employed in it. But the Court is not to be eager to find difficulties, and should, as far as possible, give the Act the full operation which the Legislature intended it should have.

Then Mr. *Marten* goes on to say that, if the Act is construed in the way I suggest it should be, its application may be narrowed. I doubt whether the application of the Act would be narrowed by

(1) [1891] 1 Ch. 423. (2) [1891] 1 Ch. 429.

such a construction; but, whether it would be or not, I do not think I ought to be influenced by such an argument. The question is, has the Legislature extended the powers of trustees in a particular direction; and, if the Legislature has done so, has it met the particular case which arises here? If I come to the conclusion that it has not, then I do not think I ought to shrink from the logical conclusion merely because I should be not extending but narrowing the construction of the Act.

Now, what I am asked to do is to hold that the trustees may appropriate a sum of *India* 3½ per Cents. as the fund to produce this annuity of £250. But what is the meaning of appropriation? The trustees here, as is often the case, are directed to convert the testator's residuary property, to invest the proceeds of sale, and out of the investments to pay an annuity; and here, as often occurs and ought to occur, the testator gives particular directions that the annuity shall be paid in the first place. The result is that, unless the estate is a large one, there may arise, as often happens, a doubt whether the persons taking subject to the annuity will be paid anything; because, so long as that annuity is not adequately provided for, and as long as all risk is not out of the question, there is nothing left for anybody else; and it is the experience of every practitioner that in many cases the administration of an estate is much hampered by an overriding payment in favour of some legatee. For this reason, in a well-drawn will, the testator gives directions to set apart an adequate sum to meet the annuity; the intention, either expressed or implied, being that, when that appropriation is made, and you have a fund which, in the discretion of the trustees, is sufficient to meet the annuity, the rest of the estate shall be discharged from that annuity—in other words, shall be available for the payment of legacies, and also ultimately for the payment of the residuary legatees. A prudent testator gives his trustees a wide discretion, but at the same time limits it only so far that they shall make such an investment as will produce the annuity; his object, of course, being that the annuitant shall be safe, as well as that the persons taking subject to the annuity shall receive their shares of the estate. Formerly the Court, where the matter was left to it, was content with an investment in Consols,

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Reduced or New Three per Cents., and with nothing else. In my judgment, I think it ought nowadays to be content with such a sum of New Consols as, treating the interest at 2½ per cent., would be sufficient. But where the will has given the trustees a discretion, then they have either to exercise it without the direction of the Court, or, if necessary, the Court has to construe it. Here the testator has given a discretion to his trustees. They are "to set apart, when and as soon as to the trustees or trustee seem fit, and invest in their or his names or name, in any of the investments in which the proceeds of sale and conversion of my estate is hereby authorized to be invested, a sum of money, the income whereof, when invested, shall be sufficient at the time of investment to pay the same annuity"; and then they are to pay the same accordingly. When that is done, I think the consequence will follow, that the fund set apart, and nothing else, will be liable to the annuity, and the rest of the estate will be free.

But the testator has said, "in any of the investments in which the proceeds of sale and conversion of my estate is hereby authorized to be invested"; and I am asked to read into that direction the statutory power, so that the clause will run, "in any of the investments in which the proceeds of sale and conversion of my estate are hereby authorized to be invested, or in which the trustees may, under any statutory power, invest." He has not said so; and I do not think that the Legislature has said that trustees shall have that additional power. It seems to me quite a different thing to say, on the one hand, that trustees shall have power to invest in order to produce income as between the tenant for life and remainderman, with the view of ultimately securing the capital sum; and, on the other hand, to authorize trustees to set apart a particular sum so as to secure an annuity and free the residuary estate from any charge in respect of it. I do not think the Legislature ever contemplated an appropriation of this kind. In my opinion, I should be going beyond the words of the will, and beyond the words of the Act, if I read the word "hereby" as I am asked to read it, in order to sanction this appropriation. Therefore, I must answer the question put to me in the negative.

I should add this. Mr. *Warmington* has suggested that the

same result might be arrived at by the exercise of the power to vary investments given at the end of sect. 3 of the Act, and which was the subject of discussion in the case of *In re Dick* (1). If I am right in regard to the inability of the trustees to appropriate under the powers of the Act, I doubt whether they could first invest in a stock expressly authorized by the will and appropriate that for the annuity, and then, under the power of variation given by the Act, reinvest in a stock authorized by the Act. However, it is unnecessary for me to decide that question now.

Solicitors: *E. R. Taylor; Berkeley, Calcott & Co.; M. L. B. Braund.*

G. I. F. C.

HICKS *v.* ROSS.

[1869 H. 43.]

Annuity—Present Payment in Cash in lieu of Perpetual Annuity—Amount how to be ascertained.

Where an annuitant, entitled to a perpetual annuity adequately secured, is willing to receive a present payment of cash in lieu of his annuity, the amount of such cash payment ought to be such a sum as, at the price of the day, will purchase 2½ per cent. Government stock sufficient to produce the annuity, excluding any charge for brokerage.

PETITION.

Thomas Ross, who died on the 30th of August, 1868, by his will, dated the 25th of August, 1868, gave the sum of £800 per annum, to be appropriated by his trustees to the maintenance and education of the eight children of *Isabella Hicks*.

By an order dated the 16th of March, 1872, made upon the further consideration of a suit for the administration of the testator's real and personal estate, it was declared that the sum of £800 per annum was a perpetual annuity, and that the whole of the real and personal estate of the testator remaining unsold was chargeable therewith. The case upon further consideration in reference to the annuity, is reported (2).

(1) [1891] 1 Ch. 423. (2) Law Rep. 14 Eq. 141.

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By payment of legacy duty, the annuity of £800 per annum was reduced to £736 16*s.* 5*d.*

There were sums of £31,844 0*s.* 1*d.* and £3943 10*s.* 5*d.* New Consols, and £213 9*s.* 1*d.* and £26 8*s.* 8*d.* cash, standing in Court to the credit of the suit.

The persons entitled to participate in the annuity were all *sui juris*, and were willing or desirous to receive an immediate payment in lieu of their respective interests in the annuity, and the major part of them presented this petition, asking that so much of the above-mentioned sums of stock as if sold and invested, together with the sums of cash, at interest at £2 10*s.* per cent., would be sufficient to produce a perpetual annuity of £736 16*s.* 5*d.*, might be sold, and that the proceeds of sale and cash might be distributed among the persons entitled.

The persons entitled to the testator's residuary estate were willing that the annuity should be paid off, and the only question argued was as to the principle upon which the amount of the cash payment to be now made in lieu of the annuity was to be ascertained.

Warmington, Q.C., and *Cann*, for the Petitioners:—

The proper mode of determining the cash payment which ought to be made in respect of this perpetual annuity is to calculate the sum which will purchase so much 2½ per cent. Government stock as will produce dividends amounting to £736 16*s.* 5*d.* per annum. An investment in New Consols will not meet the exigencies of the case. In former times, the Court considered that a provision in Consols was sufficient; but that was because Consols were regarded by the Court as a permanent £3 per cent. security. But events have proved that they cannot be so regarded, and it is submitted that the basis on which the Court ought to proceed is that pointed out by the *National Debt (Supplemental) Act*, 1888 (51 & 52 Vict. c. 15), which provides by sect. 1 that references in the *Government Annuities Act*, 1829, to bank or other annuities bearing interest at 3 per cent. per annum, shall, with respect to annuities for lives, or for terms of years to be hereafter granted under that Act, be construed as references to bank annuities bearing interest at the rate of 2½ per cent. per annum.

The basis on which the capital sum to be paid for annuities has been determined has always been that of Government annuities; and the Court adopted Consols, because the price of Government annuities was determined by reference to Consols. That price is now determined by reference to a stock bearing interest at $2\frac{1}{2}$ per cent. In the present case, the difference in price between a purchase of $2\frac{1}{2}$ per cent. stock sufficient to meet the annuity and a like purchase of New Consols is considerable; the estimated sums required being, for the latter, £27,704, and for the former, £28,587. The question is one of principle, and the principle is clear that the owner of a perpetual annuity is entitled to the best security the estate can give: *Hill* v. *Rattey* (1).

Renshaw, Q.C., and *Macaskie*, for the residuary legatees:—

The proper mode of determining the cash payment, in the circumstances of this case, is by reference to an investment in New Consols, *i.e.*, on the footing of $2\frac{3}{4}$ per cent., reducible to $2\frac{1}{2}$ per cent. in 1904. At all events, the Court should not do more than direct the investment in New Consols of such a sum as, treating the interest as $2\frac{1}{2}$ per cent. instead of $2\frac{3}{4}$ per cent., will yield the annual sum of £736 16*s.* 5*d.* That is the course which the Court constantly adopts in administering estates with a view to clearing the residue where annuities are given by the will. The basis of a Government annuity is not applicable to the present case, because it is not the practice of the Government to grant perpetual annuities. The right of the annuitants is simply to have such a sum appropriated out of the estate as, on a fair calculation of probabilities, would be sufficient from time to time to produce the required annual sum.

Theobald, and *Ingpen*, for other parties.

Aug. 1. KEKEWICH, J.:—

The problem to be solved may be thus stated. A man entitled to a perpetual annuity, adequately secured, is willing to be paid off—that is, to receive a present payment of cash in lieu of his annuity—and the owner of the property charged is

(1) 2 J. & H. 634.

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prepared to pay him off. The question is, on what principle should the sum of cash be ascertained? One thing is certain. The annuity being perpetual, and the security adequate, the annuitant is entitled to such a sum as will in future produce the annuity, and I think he is further entitled to say that as, in order to produce the annuity, the sum must be invested, and presumably will remain invested for an indefinite term, he will have the investment so made that there is no avoidable risk of deterioration of security or diminution of interest. In cases where annuities for limited periods, such as the life of the annuitant, are given by will, and the residue is disposed of subject to the annuity, the Court has frequently to consider how the annuitant can be protected, consistently with clearing the residue, and formerly it was the practice of the Court to direct investment in Consols of such a sum as would produce the annuity. The Court treated Consols as a permanent 3 per cent. security, and did not think it necessary to make any further provision. Events have shewn such provision to be imperfect, and I am afraid that some annuitants have suffered accordingly. It has been my practice in recent cases to direct the investment in New Consols of such a sum as, treating the interest as $2\frac{1}{2}$ instead of $2\frac{3}{4}$ per cent., will yield the required annual amount, and that I think reasonably meets the just claims of all parties concerned, because there is provision for a fall of a quarter per cent. below the present rate of interest, and no further reduction, during the annuity period, need be contemplated. A like provision would not be strictly applicable to this case, because it proceeds on the assumption that for a time at least the income received will be in excess of the demands upon it, and here the object is to ascertain the precise amount required to yield the annuity now and for ever. I think that the *National Debt (Supplemental) Act*, 1888, indicates the proper solution. Before that Act it was the rule, in granting Government annuities, to calculate the sum paid for their purchase with reference to Consols bearing interest at the rate of 3 per cent.; but now, under that statute and by reason of the conversion of Consols, the amount is calculated with reference to $2\frac{1}{2}$ per cent. stock. In other words, the Commissioners for the Reduction of the

National Debt are bound to treat 2½ per cent. as the rate of interest governing their calculations. The Commissioners are concerned only with terminable annuities; but nevertheless this seems to be a safe guide, and one which I ought to follow. Therefore, the amount of cash to be paid to the redeemed annuitant will be such a sum as at the price of the day will purchase 2½ per cent. stock sufficient to produce the annuity. As the annuitant is to receive cash, and not stock, and therefore no actual purchase will be made, charge for brokerage should be excluded.

It is necessary to fix the day on which the price is ascertained, and I think that the better plan will be to take to-day for that purpose, and to make it also the date of the order. There was a question whether any purchase of stock to provide the annuity might not operate to give the annuitant overmuch by reason of the variance in the dates of payment of the annuity, and the dividends on stock; but there was an undertaking that this should be set right, and I have therefore not troubled myself further about it.

Mr. *Warmington* referred me to a case of *Hill* v. *Rattey* before Vice-Chancellor *Wood* (1), and it was the only case cited with reference to the point which I have had to consider, and which to some extent seems to be a new one. The Vice-Chancellor held that the owner of the annuity, which in that case also was a perpetual annuity, was entitled to the best security the estate could give, and so far the case is useful as a guide; but there the annuity had to be paid out of the estate, and the question was not what would be the proper mode of redemption otherwise than by that means, but what part of the estate ought to be appropriated. The order (2) shews this.

Solicitor for Petitioners: *Montagu Hawkins.*

Solicitors for Respondents: *J. P. Theobald; J. T. Theobald; J. G. Ross; Hicks & Arnold.*

(1) 2 J. & H. 634.

(2) 2 J. & H. 646.

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June 5, 6, 8, 9; Aug. 3.

DUKE OF SUTHERLAND *v.* HEATHCOTE.

[1890 S. 980.]

Deed—Construction—Conveyance—Mine—Exception of Minerals—License to work Minerals—Exclusive or non-exclusive—Setting aside Lease—Mutual Mistake.

Lord Mountjoy's Case (1) does not decide that a license to dig coal cannot be exclusive, and although there is a *primâ facie* presumption against such a license being exclusive, the intention to exclude the grantor need not appear by express words.

Dictum of Lord *Ellenborough* in *Chetham* v. *Williamson* (2) dissented from.

Earl *G.* and Viscount *T.*, the Plaintiff's predecessors in title, having a general power of appointment over lands of which they were respectively tenant for life in possession and tenant for life in remainder, by a deed of exchange executed in 1783, granted and appointed such lands to the Defendant's predecessor in title in fee, saving and reserving to themselves and their heirs full and free liberty to get and carry away the coal within the said lands. The Plaintiff had only recently become aware of his rights under this deed, and neither he nor his predecessors in title had ever worked the coal therein referred to, and in 1877 the Plaintiff accepted a lease from the Defendant of a portion of such coal. The Plaintiff claimed the exclusive right to the coal, and he also claimed to have the lease set aside:—

Held, that the saving clause operated not as an exception, but as a regrant of a license, and that the deed did not contain a sufficient indication of an intention to exclude the grantor:

Held, further, that the action being based on the exclusive right of the Plaintiff, he was not entitled in that action to have the lease set aside.

THIS action was brought by the Duke of *Sutherland* as tenant for life, without impeachment of waste, of certain lands in *Staffordshire* known as the *Trentham* estate, against *Justinian H. E. Heathcote*, the owner of an adjoining estate called the *Longton Hall* estate, and *W. R. Blair* and *A. H. Bird*, lessees of *Heathcote*.

The object of the action was to establish the Duke's title to the mines of coal, ironstone, and other minerals underlying certain lands at *Longton*, which had been conveyed by Earl *Gower* and his son Viscount *Trentham*, the Duke's predecessors

(1) Godb. 17; 1 Anderson, 307. (2) 4 East, 469.

in title, to *John E. Heathcote*, the Defendants' predecessor in title, under a deed of exchange, dated the 30th of October, 1783.

At the date of this indenture, the lands in question were subject to certain indentures of lease and release dated respectively the 14th and 15th of August, 1781, whereby the several estates of Earl *Gower* and Viscount *Trentham*, in the counties of *York*, *Stafford*, and *Salop*, were granted and released by them to the Duke of *Bridgwater* and the Earl of *Carlisle*, and their heirs and assigns, to and for the uses, intents, and purposes, and upon the trusts therein mentioned, and by the terms of the said indenture of release and settlement the *Staffordshire* estates were limited first to the use of Earl *Gower* for life, subject to a term of ninety-nine years, to secure a rent-charge to Viscount *Trentham*, and afterwards to the use of Viscount *Trentham* as tenant for life in remainder expectant on the death of the Earl, subject to a term of 200 years, to secure certain charges as therein mentioned; and the said indenture of release contained a proviso conferring a general power of revocation and new appointment by deed upon Earl *Gower* and Viscount *Trentham* jointly.

By the deed of exchange of the 30th of October, 1783, which was made between Earl *Gower* and Viscount *Trentham* of the one part, and *John E. Heathcote* of the other part, it was recited that "the said *Granville* Earl *Gower* and *George Granville* Lord Viscount *Trentham* are now seised in their demesne as of fee of and in a messuage, farmhouse, or tenements, with the outbuildings thereunto belonging, situate, standing, and being in *Longton* aforesaid, now or late in the possession of *John Ford* as tenant thereof, and also of and in several pieces or parcels of land, situate, lying, and being in *Longton* aforesaid, and *Blurton*, in the said county of *Stafford*, which are hereinafter particularly mentioned, and do contain by admeasurement 56A. 3R. 7P." Then, after reciting that *J. E. Heathcote* was seised in fee of certain other lands in *Longton* containing 67A. 3R. 26P., and that the parties had agreed to exchange the lands above referred to, the deed recited that "by certain indentures of lease and release bearing date respectively the 14th and 15th days of August, which was in the year of our Lord 1781, the said indenture of release being of four

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parts, and made between the said *Granville* Earl *Gower* and *George Granville* Lord Viscount *Trentham* of the first part, the Most Noble *Francis* Duke of *Bridgwater* and the Right Hon. *Frederick* Earl of *Carlisle* of the second part, Sir *John Wrottesley*, Bart., and *Archibald Macdonald*, Esq., of the third part, and the Right Hon. *Thomas* Lord Viscount *Weymouth* and the Hon. *Keith Steward*, Esq., of the fourth part, the several manors, messuages, lands, tenements, rectories, tithes, advowsons, hereditaments, and premises of them the said *Granville* Earl *Gower* and *George Granville* Lord Viscount *Trentham* therein mentioned, within the several counties of *York*, *Stafford*, and *Salop*, were granted and released unto the said *Francis* Duke of *Bridgwater* and *Frederick* Earl of *Carlisle* and to their heirs and assigns, to and for such uses, intents, and purposes, and upon such trusts and subject to and under such charges, limitations, powers of revocation, new appointment, provisoes, and agreements as are therein limited, expressed, and declared of and concerning the same, in which said recited indenture of release and settlement there is contained a proviso in the words or to the effect following." The recital then proceeded to set out verbatim the terms of the joint power of revocation and new appointment conferred upon Earl *Gower* and Viscount *Trentham* as above stated. And it was witnessed that the said Earl *Gower* and Viscount *Trentham*, "in order to enable them legally to make the said exchange to and with the said *J. E. Heathcote* as aforesaid, by virtue of the power reserved and given to them in and by the said recited proviso as aforesaid," revoked and determined the uses created by the said indenture of release so far as the same related to the property by the now stating indenture intended to be exchanged and transferred to the said *J. E. Heathcote*. And it was further witnessed that the said Earl and Viscount, in consideration and pursuance of the said exchange and for divers other good and valuable considerations, exchanged, granted, bargained, sold, aliened, transferred, limited, appointed, and confirmed unto the said *J. E. Heathcote*, his heirs and assigns, the said messuage and lands at *Longton*, therein particularly described, and all the estate, right, title, interest, claim, and demand whatsoever of the said Earl *Gower* and Viscount *Trentham*, or either of them, of,

in, and to the said lands and premises, "Saving and reserving nevertheless to the said *Granville* Earl *Gower* and *George Granville* Lord Viscount *Trentham*, and to their heirs and assigns, full and free liberty by all necessary and convenient ways and means to search for, get, dig, drain, and carry away the coal, ironstone, and minerals which may or shall be found within the several lands hereby granted and exchanged from them the said Earl *Gower* and Lord Viscount *Trentham* to the said *J. E. Heathcote*, his heirs and assigns, and also to drive any sough, level, or gutter through the same lands to any other lands or grounds of them the said Earl *Gower* and Lord Viscount *Trentham*, or either of them, making satisfaction for all damages to be done or occasioned by the use or exercise of any of the privileges aforesaid. To have and to hold all and singular the said messuage or tenement, lands and premises (saving and except as aforesaid), with their and every of their appurtenances, unto the said *J. E. Heathcote*, his heirs and assigns, to the only proper use and behoof of the said *J. E. Heathcote*, his heirs and assigns, for ever." And it was further witnessed that the said *J. E. Heathcote*, in consideration of the said exchange and of £14 9*s*., exchanged and transferred to the said Earl and Viscount the lands thereinafter described. And the deed contained an indorsement to the effect that the £14 9*s*. was fully satisfied by the allotment to the said *J. E. Heathcote* of certain further plots of land therein mentioned.

Neither the Duke nor his predecessors in title had ever worked the mines underlying the land conveyed by the said Earl and Viscount by the above-mentioned indenture, and, in fact, the proviso relating to such mines had only recently been discovered by the Duke's agent.

By an indenture dated the 21st of December, 1865, *John E. Heathcote*, the younger, the Defendant *Heathcote's* uncle and immediate predecessor in title, granted a lease to Messrs. *James* and *Alfred Glover*, the predecessors in title of the Defendants *Blair* and *Bird*, for thirty-five years from the 25th of March, 1864, of all or such part as belonged to him of the mines, coal, ironstone, slack, and marl, and all other minerals whatsoever, under a portion of the *Longton Hall* estate. The demised property included a portion of the mines now claimed by the Duke.

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It comprised altogether eighteen seams of coal, of which four only had been worked by the lessees up to the present time.

By an agreement in writing, dated the 22nd of May, 1876, made between the Duke of the one part, and the Defendants *Blair* and *Bird* and two other persons, successors in title of the *Glovers*, (thereinafter called the lessees), of the other part, the Duke agreed to grant a lease of such parts of a certain seam of coal as lay on the north side of a certain fault shewn on the plan thereto annexed, and the agreement contained a recital to the following effect: "Whereas the lessees are the present lessees and workers of the mines and minerals lying on the north side of the seam of coal hereinafter mentioned under an indenture of lease dated the 21st of December, 1865, and made between *J. E. Heathcote* (since deceased) of the one part and *James Glover* (since deceased) and *Alfred Glover* (since deceased) of the other part, whereby certain mines and minerals under the *Longton Hall* estate of the said *J. E. Heathcote* were demised to the said *J. Glover* and *A. Glover* for the term of thirty-five years from the 25th day of March, 1864." The mines and minerals referred to in the recital formed a portion of the mines and minerals claimed by the Duke as above stated.

By an indenture of the 4th of January, 1877, the Defendant *Heathcote*, who had then succeeded to the *Longton* estate, with the concurrence of his mortgagees, granted a lease to the Duke for forty years from the 25th of December, 1874, of all the mines of coal and ironstone under a portion of the *Longton* estate adjoining the mines leased to the Messrs. *Glover*. The mines demised by this indenture included the remaining portion of the mines claimed by the Duke in this action.

The Duke claimed a declaration that he was entitled to all mines and seams of coal, ironstone, and other minerals under the lands conveyed by his predecessors in title by the deed of exchange of the 30th of October, 1783; an injunction restraining the Defendants from working the coal and other minerals thereunder; and to have the lease of the 4th of January, 1877, set aside or rectified. He also claimed an account of the coal wrongfully taken by the Defendants, and damages.

The Defendant *Heathcote* by his defence alleged that he and

his predecessors in title had been in uninterrupted possession of the hereditaments conveyed to *John E. Heathcote* (the elder) by the deed of 1783, and of the mines thereunder for over 100 years; that the license reserved by the deed of 1783 had been abandoned; and that if subsisting it was not an exclusive license; and he pleaded the *Statute of Limitations* and the neglect and laches of the Plaintiff. The Defendants *Blair* and *Bird* alleged, in addition to these defences, that the Plaintiff, by executing the agreement of the 22nd of May, 1876, acquiesced in their title to the mines comprised in the lease of the 21st of December, 1865.

Rigby, Q.C., *Neville*, Q.C., and *Hadley*, for the Plaintiff:—

The Plaintiff's claim depends on the construction of the deed of 1783. The deed commences with a recital that Earl *Gower* and Viscount *Trentham* were seised in fee of the property which they intended to exchange; they had full power to deal with the property in any manner they chose, and it was competent for them to carry out the exchange by making themselves the owners in fee. That recital operated as an appointment and gave them the fee simple in the land, including the reserved minerals: *Poulson* v. *Wellington* (1). No formal words are required to execute a power of appointment if such an intention is shewn by the instrument: *Rowbotham* v. *Wilson* (2); *Wilson* v. *Piggott* (3).

Assuming the minerals to have been vested in Earl *Gower* and Viscount *Trentham*, they were excepted from the grant to *J. E. Heathcote*. The words "saving and reserving" are equivalent to "saving and excepting," and denote that something is kept back out of the grant: *Coke* upon *Littleton* (4); *Leigh* v. *Shaw* (5); *Sheppard's Touchstone* (6). And the exception of the liberty of working the coal has the same effect as if the coal itself were excepted: *Duke of Hamilton* v. *Dunlop* (7). Even assuming that the proviso operates not as an exception but as a license, the Plaintiff still has the sole and exclusive right to the minerals, as

(1) 2 P. Wms. 533.
(2) 8 H. L. C. 348, 362.
(3) 2 Ves. 351.
(4) Pages 47 a, 143 a.
(5) 1 Cro. Eliz. 372.
(6) Page 78.
(7) 10 App. Cas. 813.

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it is not a license for a limited time or for a limited purpose, and the consideration is independent of the quantity of coal taken.

If the Plaintiff has under the deed of exchange the sole and exclusive right to the mines, such a right does not become abandoned merely by non-user, and the Plaintiff's claim is not barred by laches or delay or by the *Statute of Limitations*. In the case of a mine, in order that the statute may run it is not enough to prove that the Plaintiff is out of possession; it is necessary to prove that somebody else is in possession: *Seaman* v. *Vawdrey* (1); *Smith* v. *Lloyd* (2); *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company* (3); *Earl of Dartmouth* v. *Spittle* (4).

If the deed of 1783 did not take away the Plaintiff's rights, the lease of 1877 ought to be set aside on the ground that it was executed under a common mistake as to the ownership of the minerals. This argument is equally good whether the Plaintiff is entitled to an estate in the mines, or is entitled to take away the minerals without paying for them; and if there was a mistake the maxim, "*Ignorantia juris neminem excusat*," does not affect the case, because that maxim applies not to the construction of a doubtful deed but to general principles of jurisprudence: *Cooper* v. *Phibbs* (5); *Earl Beauchamp* v. *Winn* (6). The language of Lord *Chelmsford* in the latter case is conclusive as to the claim for rectification, though the decision there was that there was no mistake in fact.

The recital in the agreement of May, 1876, is relied upon by the Defendants *Blair* and *Bird* to shew that the Plaintiff has acquiesced in their title; but there can be no acquiescence while the Plaintiff is ignorant of his rights; nor is the recital sufficiently definite to operate as an estoppel against the Plaintiff: *Heath* v. *Crealock* (7).

Finlay, Q.C., *Haldane*, Q.C. (*Decimus Sturges*, with them), for the Defendant *Heathcote*:—

There are four points in this case: (1.) the construction of the

(1) 16 Ves. 390, 392.
(2) 9 Ex. 562, 572.
(3) 4 Ch. D. 845, 847.
(4) 19 W. R. 444.
(5) Law Rep. 2 H. L. 149.
(6) Ibid. 6 H. L. 223.
(7) Law Rep. 10 Ch. 22.

deed of 1783; (2.) acquiescence; (3.) estoppel; (4.) the *Statute of Limitations*.

First, as to the point of construction. It is said that Earl *Gower* and Viscount *Trentham* were seised in fee by virtue of the recital to that effect acting either by way of an informal appointment or as an estoppel. The recital does not act as an estoppel, because it is qualified by the subsequent recital which shews the true nature of the title, and there is no estoppel by deed where the truth appears by the same instrument: *Rowbotham* v. *Wilson* (1); *Right* v. *Bucknell* (2); *Crofts* v. *Middleton* (3). Neither does it act as an informal appointment. *Wilson* v. *Piggott* (4), which was relied on by the other side, was treated as a case in which the Court might aid the defective execution of a power; but that doctrine does not apply to the case of a father and son making a voluntary appointment in favour of themselves: *Tollet* v. *Tollet* (5). We admit that no formal words are needed to execute a power where such is the intention of the instrument: *Minchin* v. *Minchin* (6), where the doctrine relating to the informal execution of powers is summed up by Lord *O'Hagan*; but here there is no such intention. If the first recital had stood alone, it might have operated as an execution of the power; but the intention is defined by the subsequent parts of the deed. If the recital operated in the way proposed, there would be no power left to execute, and the words specifically dealing with the property in the operative part would be mere surplusage. The first recital is a mere conveyancer's recital. *Poulson* v. *Wellington* (7), therefore, does not apply.

Then it is said that the proviso operates as an exception; but the answer to that argument is that the limitation is to Earl *Gower* and Viscount *Trentham*, their heirs and assigns, and not to the uses of the settlement, and the clause purports to create a new interest. This proviso therefore operates as a regrant by *J. E. Heathcote* of an incorporeal hereditament, viz., a license. Where it is desired to except the mines from a grant, there

(1) 8 H. L. C. 348, 364.
(2) 2 B. & Ad. 278, 281.
(3) 2 K. & J. 194, 205.
(4) 2 Ves. 351.
(5) 1 Wh. & T. L. C. Eq. 6th Ed. p. 269.
(6) I. R. 5 Eq. 258.
(7) 2 P. Wms. 533.

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is a proper form of words for that purpose whereby the mines themselves are excepted: *Davidson's* Precedents (1), and if that had been the intention in this case one would have expected the language of the deed to be in that form. *Duke of Hamilton* v. *Dunlop* (2) is an authority on Scotch law only, and does not apply. Upon the English authorities we submit that the words in this deed operate as a license only, and not an exclusive license: *Carr* v. *Benson* (3); *Chetham* v. *Williamson* (4), where Lord *Ellenborough* says, "No case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals so as to enable him to maintain trover against the owner of the estate for coals raised by him": *Lord Mountjoy's Case* (5); *Doe* v. *Wood* (6).

Secondly, the Plaintiff's claim is barred by acquiescence, for he cannot be heard to say that he has no knowledge of his own title deeds.

Thirdly, as to the mines comprised in the lease of 1877, the Plaintiff, having taken possession under the lease, is estopped from denying his landlord's title during the continuance of the lease: *Smith's* Leading Cases (7); *Clark* v. *Adie* (8). And it is not enough that the Plaintiff has put in a claim to have the lease set aside; he ought to have given up possession: *Stone* v. *Godfrey* (9).

Further, there do not exist in this case the conditions which are essential in order to enable a lease to be set aside on the ground of mistake, viz., (1.) that the mistake should be plain and palpable, and (2.) that it should be possible to replace the parties in their original position: *Earl Beauchamp* v. *Winn* (10).

Moreover, there is a great difference between setting aside a transaction *in fieri*, such as an agreement and a completed conveyance such as a lease. Except *Bingham* v. *Bingham* (11), no authority can be found for the proposition that a completed con-

(1) 4th Ed. vol. ii. pt. 1, p. 493.
(2) 10 App. Cas. 813.
(3) Law Rep. 3 Ch. 524.
(4) 4 East, 469, 475.
(5) Godb. 17; 1 Anderson, 307; Moore, 197; 4 Leon. 147.
(6) 2 B. & Al. 724, 737.
(7) 9th Ed. vol. ii. p. 914.
(8) 2 App. Cas. 423, 435.
(9) 5 D. M. & G. 76, 92.
(10) Law Rep. 4 Ch. 562, 567; 6 H. L. 223.
(11) 1 Ves. Sen. 126; Suppl. 79.

veyance can be set aside on the ground of mistake. The contrary is laid down in *Brownlie* v. *Campbell* (1) and *Soper* v. *Arnold* (2), where Lord Justice *Cotton* distinguishes *Jones* v. *Clifford* (3) and *Hart* v. *Swaine* (4).

Lastly, the claim is barred by the *Statute of Limitations*; for all the mines in dispute are comprised either in the lease of 1865 or in the lease of 1877, and the possession of the tenant is the possession of the landlord. Where there is an intention to deal with the whole of a mine and physical possession is taken of part, that is a sufficient possession of the whole: *Wild* v. *Holt* (5); *Low Moor Company* v. *Stanley Coal Company* (6).

Beale, Q.C., and *Rashleigh*, for the Defendants *Blair & Bird*:—

Whatever remedy the Plaintiff may have against the Defendant *Heathcote*, he must give full effect to the lease of 1865, in which he has acquiesced: *Plimmer* v. *Mayor of Wellington* (7). In *Cooper* v. *Phibbs* (8) the decree contained directions protecting the interests of those against whom relief was granted.

[Upon the *Statute of Limitations* they referred to *Ashton* v. *Stock* (9) and *Agency Company* v. *Short* (10).]

Sidney Wright watched the case on behalf of the *Stafford Coal and Iron Company*, to whom the Plaintiff had assigned the lease of 1877.

Rigby, in reply:—

It is objected that the proviso cannot operate as an exception, because the estate is limited to the grantors and their heirs; but the terms of the exception are consistent with the language of the first recital, and in the *Duke of Hamilton* v. *Dunlop* (11) the exception did not accurately express the estate of the grantors. That case was decided on general principles, and is not confined to Scotch law. If the clause is to be construed as an exception,

(1) 5 App. Cas. 925, 937.
(2) 37 Ch. D. 96.
(3) 3 Ch. D. 779.
(4) 7 Ch. D. 42.
(5) 9 M. & W. 672.
(6) 34 L. T. (N.S.) 186.
(7) 9 App. Cas. 699.
(8) Law Rep. 2 H. L. 149.
(9) 6 Ch. D. 719, 726.
(10) 13 App. Cas. 793, 799.
(11) 10 App. Cas. 813.

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the same case shews that reserving the liberty to work the coal is equivalent to reserving an estate in the coal, inasmuch as it is impossible to except from a grant an incorporeal hereditament, such as a liberty to work minerals, which had no previous existence. But assuming the clause to operate as a grant of a license, it is a right extending to the whole of the coal, and is an exclusive right. I do not deny that the deed takes effect as an appointment to *Heathcote*; but the question is what was appointed. On either view of the deed the result is to give the whole beneficial interest in the coal to the Plaintiff. The cases cited in opposition to this contention are not in point. *Carr* v. *Benson* (1) is no authority either on the question whether the words in this deed should be construed as a license, or on the question whether the license is exclusive. There the deed contained no general liberty to take everything; the license was limited to twenty-one years; a clear interest was left in the lessors; and it was admitted that the license was not exclusive. That case merely decides that where the evidence shews that the purpose of the license requires everything to be taken, then there can be no derogation from the grant.

Chetham v. *Williamson* (2) is no authority on the first question, for it was impossible to construe the language of the instrument in question in that case as an exception, and there was not there any question of exclusive right. Consequently the *dictum* of Lord *Ellenborough* is merely *obiter*; and it is open to this further observation, that it is not borne out by the case on which it is avowedly founded, viz., *Lord Mountjoy's Case* (3). That case is reported in four places; but the only authoritative report is that by *Anderson*, C.J. According to that report, no question of exception and no question of exclusive license was considered by the Court; but the question there was whether there was an absolute or conditional conveyance. In *Doe* v. *Wood* (4), the question was whether the operative part of a deed which imported a grant of a license only could be controlled by language occurring in a subsequent part of the deed which

(1) Law Rep. 3 Ch. 524.
(2) 4 East, 469.
(3) Godb. 17; 1 Anderson, 307; Moore, 197; 4 Leon. 147.
(4) 2 B. & Al. 724.

referred to the grant as a grant of the land itself; but that is not the question in this case.

Assuming the Plaintiff to be entitled to the minerals under the deed of 1783, how are his rights affected by the subsequent events? It is said that the Plaintiff must be presumed to have knowledge of his own deeds; but there can be no acquiescence arising from constructive notice: *Willmott* v. *Barber* (1).

Then the lease of 1865 was relied on; but that is a lease only of the coal belonging to *Heathcote*, and has therefore no effect at all. With regard to the possession of the *Glovers*, I submit that a wrongdoer ought not to be treated for the purposes of the *Statute of Limitations* as having taken possession of the whole of a mine when he has only taken physical possession of a part. *Ashton* v. *Stock* (2) is an authority against such constructive possession. In *Low Moor Company* v. *Stanley Coal Company* (3), the possession was claimed in furtherance of the title. Further, if the interest of the Plaintiff is an incorporeal hereditament, the *Statute of Limitations* (3 & 4 Will. 4, c. 27) does not apply, for by sect. 1 its operation is limited to corporeal hereditaments.

[*Haldane*:—"Land" includes any interest in land which would include an incorporeal hereditament, such as is claimed here, assuming it to be an exclusive license.]

Lastly, it is said that the lease of 1877 acts as an estoppel against the Plaintiff; but the Plaintiff is tenant for life only, and this objection could be cured by making the remainderman a party to the action.

Aug. 3. VAUGHAN WILLIAMS, J.:—

In this case the Plaintiff claims a declaration that he is entitled to all the mines and seams of coal, ironstone, and other minerals in or under certain lands in the statement of claim mentioned. The claim of the Plaintiff depends primarily upon the construction of the deed of exchange of the 30th of October, 1783, made between the predecessors in title of the Plaintiff, and the predecessor in title of the Defendant *Justinian Heathcote*.

(1) 15 Ch. D. 96. (2) 6 Ch. D. 719.
(3) 34 L. T. (N.S.) 186.

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[His Lordship referred to the operative part of the deed, and to the clause commencing "saving and reserving."]

The first question that arises on the construction of this deed is the question whether the clause commencing with the words "saving and reserving nevertheless" is to be construed as excepting the mines and minerals therein mentioned from the conveyance to *J. E. Heathcote*, or whether it is to be construed as a regrant by *J. E. Heathcote* to the said Earl and Viscount of certain rights and privileges by way of license in the said lands. Much argument was addressed to me on the question whether the deed ought to be construed as a grant and conveyance by the Earl and Viscount as owners in fee, or whether it ought to be construed as a conveyance by way of appointment by the Earl and Viscount under certain powers conferred on them under a certain deed of release; but it was ultimately admitted by Mr. *Rigby*, on behalf of the Plaintiff, that the deed of 1783 took effect as an exercise of a power of appointment. Dealing, then, with the deed as an exercise of the power of appointment, I am of opinion that these words must be construed as a regrant of a license by *J. E. Heathcote*, and not as an exception from the appointment and a reservation to the appointors. It is plain that the words used are generally those apt to the grant of a license rather than the reservation from a grant of a portion of the estate. There is no apparent reason why the apt words for the reservation of a portion of the estate should not have been used if that was the intention of the parties. Much, if not the whole, of the weight of the argument based on the technical force of the words "saving and reserving" disappears when it is admitted that the deed must be construed as an exercise of the power of appointment, especially having regard to the fact that the suggested reservation is to those exercising the power of appointment who were not the legal owners of the fee of the lands conveyed. Moreover, it seems to me that, whatever may be the true effect of the case of the *Duke of Hamilton* v. *Dunlop* (1), and whether or not the case is to be treated as an authority in English law, the case ceases to be applicable the moment it is admitted that the conveyance by Earl *Gower* and Viscount *Trentham* is a

(1) 10 App. Cas. 813.

mere exercise of a power of appointment, because you no longer have a prior title to the whole property, including the coals and minerals, in the persons making the reservation in their own favour. Possibly if the license had not been in favour of Earl *Gower* and Viscount *Trentham* it might have been held that the effect of the exception was to prevent the appointment operating on the coal and minerals; but even if this would be the right construction, which I doubt, it cannot be so in a case where the reservation is to the appointors and the legal estate is in trustees. The fact that the conveyance is an exercise of a power of appointment by those who had not the legal estate makes it also unnecessary to deal with what seems to be Lord *Ellenborough's* view of the effect of *Lord Mountjoy's Case* (1)—viz., that it decides that even where the party conveying is seised of the legal estate a liberty reserved of digging for coals cannot operate to give the exclusive right to them. But I wish to say that Mr. *Rigby* convinced me that Lord *Ellenborough's* view of that decision cannot be supported when the report in *Anderson* is closely examined.

Now, assuming that according to the true construction of the clause beginning "saving and reserving nevertheless," it must be construed as a regrant by Mr. *Heathcote* of a license to deal with the coal and minerals, the next question is as to the construction of the license; is it exclusive or non-exclusive? I have arrived at the conclusion that it is non-exclusive. The point is one as to which the authorities are not satisfactory. The text-books, beginning with *Bythewood* and *Jarman's* Conveyancing (2), are unanimous that *primâ facie* a license to dig and carry away coal is non-exclusive. Sometimes it has been said that such a license must be construed as non-exclusive unless it is expressed to be exclusive. This does not seem to me to be the law. The license must be construed like any other document, according to the intention, whether such intention is expressed by particular words or is to be gathered from the words of the deed as a whole, regard being had to the purport of the deed. It may be that the origin of the notion that a license was to be construed as non-exclusive was that if the license went to the

(1) Godb. 17; 1 Anderson, 307; Moore, 197; 4 Leon, 147.
(2) Ed. 1831, vol. iv. p. 243.

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whole profits of the land, and you construed it as exclusive, you in effect, in the case of mines, gave the grantee of the license the fee simple of the mines. Lawyers, at all events in feudal times, would not allow such a construction. This view will be found to be discussed in *Co. Litt.* (1), and will be found cropping up in argument and in judicial *obiter dicta* again and again. See notably the argument and observations in *Bailey* v. *Stephens* (2). But whatever may have been the notion in feudal times, it seems firmly established that such right of property may have a legal existence as an easement in gross to the exclusion of the grantor: *Lee* v. *Stephenson* (3); and the observations of Mr. Justice *Willes* in *Bailey* v. *Stephens*. Moreover, the cases of *Wilson* v. *Mackreth* (4) and *Harker* v. *Birkbeck* (5) shew that the possibility of an exclusive right is recognised.

Assuming, then, that there can be an exclusive mining license and that the intention to exclude the grantor need not appear by express words, it remains to consider whether the intention to exclude the grantor appears sufficiently in the deed under consideration. The main ground upon which it is urged that the intention to exclude the grantor appears is that the consideration is one sum paid once for all, and in no sense relatively proportioned to the quantity of coal gotten. I have looked with some care through the cases, and I find no decision directly in point on this question.

In Lord *Mountjoy's Case* (6) the license was limited to the digging of sufficient ores, heath, turves, &c., for the making of alum or copperas, that is, was a liberty for a particular purpose, and therefore it is not necessarily an authority on the construction of a general license not so limited.

In *Chetham* v. *Williamson* (7), the license seems to have been general in its terms, and it was held that the grantor was not excluded; but the judgment of Lord *Ellenborough* seems to go too far to be consistent with modern cases, because it seems to go the length of holding that there cannot be a right to dig

(1) Page 4 b.
(2) 12 C. B. (N.S.) 91.
(3) E. B. & E. 512.
(4) 3 Burr. 1824.
(5) 3 Burr. 1556.
(6) Godb. 17; 1 Anderson, 307; 4 Leon. 147.
(7) 4 East, 469.

coals to the exclusion of the owner of the soil. But it may be that all Lord *Ellenborough* means was that which he expresses in the next passage, viz., that the liberty to dig for coals in the soil of another cannot give such an exclusive right to the grantee as to enable him to bring trover against the owner of the estate for coals raised by him. At all events, the general question of the right of the licensee was not essential to the determination of the case, and the Plaintiff does not appear to have been in possession of the part of the mine under which the coal was gotten.

Then, in *Doe* v. *Wood* (1), the only point really decided was that the instrument under which the plaintiff claimed was not a lease, but only a license; and that being a license only there was not possession such as to enable the licensee to bring ejectment against a trespasser, and Lord *Tenterden* says: "This, we think, is the effect and operation of the deed, considering it with reference to its granting part only; and we are fortified in this opinion by the construction given to similar words of grant in Lord *Mountjoy's Case* (2), and in *Chetham* v. *Williamson* (3); even if the liberty granted be to be considered a liberty to get, *exclusive of the grantor*; and *à fortiori*, if it be, as in those cases, to be considered as not exclusive; that, however, is a point which it is unnecessary for us now to decide." So it is clear that Lord *Tenterden* leaves the question of the effect of the license undecided.

In *Newby* v. *Harrison* (4), Sir *W. Page Wood* says: "I cannot hold the license to be an exclusive license, because, if it were intended so to be, it would be framed with words of an exclusive character. That may, I think, be assumed, unless I find something in the deed which compels me to come to a different conclusion. The distinction is well known between a mere ordinary license and an exclusive license, and in the latter you expect to find something of that nature expressed." Those words are strong to shew Lord *Hatherley* thought that the presumption against the license being exclusive could only be

(1) 2 B. & Al. 724, 739.
(2) Godb. 17; 1 Anderson, 307; 4 Leon. 147.
(3) 4 East, 469.
(4) 1 J. & H. 393, 396.

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overcome by a clearly expressed intention to the contrary; but it is to be observed in that case the circumstances were such that it was hardly possible to hold the license to be exclusive. The license related to taking ice from a canal, and the grant was a clear definite grant of so much ice as might be wanted for the purpose of filling certain ice-houses, and to have held the license exclusive might have been to render it impossible to clear the ice for the navigation of the canal.

Lastly, in *Carr* v. *Benson* (1), the same Judge says: "The plaintiff's license, it is conceded, is not an exclusive license, and it has been held from the earliest period that a man taking a license where he is under no obligation to work cannot exclude his licensor from granting as many more of those licenses as he thinks fit, provided always that they are not so granted as to defeat the known objects of the first licensee in applying for his license." But the license in that case, which was a chattel license to the licensees, their executors, administrators, and assigns, was a license to dig and convert fire-clay at a rent per ton, and the question as to the construction of a license not so limited was not really in issue.

It seems to me that the consideration of these authorities goes far to shew that they do not justify as decisions the wide statements contained in the text-books. But although I have come to this conclusion, I yet think that it is impossible to doubt that the *primâ facie* presumption is against a mining license being held exclusive, and that in the present case no intention to grant an exclusive license appears sufficiently to negative the *primâ facie* presumption. It may be that in some cases the payment of a lump sum for a license to dig and carry away the coal under a particular close may shew an intention by the licensor to sell all the coal under the close, and therefore to grant an exclusive liberty to dig such coal; but I do not think that such an inference can be drawn in the present case. It is impossible to affirm with anything like certainty what was the consideration for granting this license; one can only say that it was a part of the consideration repassing from the then Mr. *Heathcote* under the deed of exchange. One cannot say that any particular money

(1) Law Rep. 3 Ch. 524, 532.

value was attributed to it, since, unfortunately, the schedule setting forth the values put upon each plot of land exchanged has been lost. Moreover, it is impossible not to give effect to the consideration that, had the parties to the deed intended either to grant an exclusive license or to convey back to Lord *Gower* and Viscount *Trentham* the fee simple of the mines, there are well-known apt words which would have been used, and which would have put the matter beyond controversy. It is difficult to believe that in a deed skilfully and artificially drawn the conveyancer would have omitted such words if he intended such an effect. The result is, that I dismiss this action with costs in favour of the Defendants.

Neville, Q.C., asked for his Lordship's decision upon the question whether the lease of January, 1877, ought to be set aside.

VAUGHAN WILLIAMS, J.:—

I did not consider that that part of your claim was any longer open to you. You claimed to have that rectification on the ground that there had been a mistake because that lease had been granted upon the supposition that Mr. *Heathcote* was the owner, whereas it turned out that the *Duke of Sutherland* was the owner. I have decided he was not the owner. It may be that the result of the case is that the *Duke of Sutherland* is to be considered as joint owner with Mr. *Heathcote*; but even if that is so, I do not think that I ought to decide this question of rectification in this action. It will be open to you hereafter in another action to set up that that is your position, and that by reason of that being your position you are entitled to have this deed rectified; but the basis of such an action would be wholly different from the basis of your claim in this case.

Solicitors: *Gadsden & Treherne; Cooper, Thorowgood, & Tabor*, agents for *Coopers, Newcastle, Staffordshire*; *Greenfield & Cracknall*, agents for *Edward Young, Longton.*

H. B. H.

ROMER, J.

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June 23, 24.

WILSON *v.* QUEEN'S CLUB.

[1890 W. 3016.]

Building Estate—Building Lease of part to A. by Mortgagor in Possession—Conveyance of other part to B. by Mortgagees—Obstruction to Light by Hoarding—Injunction—The Conveyancing and Law of Property Act, 1881, *s.* 18.

A mortgagor in possession of land, laid out for building, granted a building lease of part of the land to *A.*, pursuant to sect. 18 of the *Conveyancing and Law of Property Act*, 1881, and the mortgagees were not parties to it. The lease was granted in consideration of buildings recently erected on the demised land. Subsequently the mortgagees conveyed a part of the land, adjoining the houses, to *B.*, who used it as a cricket ground, and erected on his boundary, adjoining the houses, a hoarding to prevent the cricket ground being overlooked by the occupiers of the houses. The hoarding caused a substantial diminution of light to the basement windows of the houses. On action by *A.* to restrain *B.* from permitting the hoarding to remain:—

Held, (1.) that the mortgagees were bound by the lease as though they had been parties to it; (2.) that *A.* was entitled to an unobstructed access of light to his houses, subject only (if at all) to restriction from buildings to be erected on other parts of the land; and (3.) that the hoarding was not a building, and must be removed.

Myers v. *Catterson* (1) followed.

By deed dated the 10th of August, 1883, and made between *W. H. Gibbs* of the first part, *Gibbs & Flew, Limited*, of the second part, and *L. Ruddle* and others (mortgagees) of the third part, certain land in the parish of *Fulham*, comprising the sites of houses and gardens afterwards known as Nos. 12, 14, and 16 *Gledstanes Road*, and also the land in the rear of the said houses and gardens, was conveyed to the mortgagees to secure the repayment to them of the sum of £10,000 and interest as therein mentioned. By deed dated the 26th of October, 1883, and made between the said *W. H. Gibbs* of the one part and *C. R. Luce* and others (mortgagees) of the other part, certain other lands in the parish of *Fulham*, comprising the site of a house and gardens afterwards known as No. 18 *Gledstanes Road*, and also the land in the rear of the said house and garden, was conveyed to the

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mortgagees to secure the repayment to them of the sum of £34,665 and interest as therein mentioned.

The lands comprised in these two mortgages adjoined each other, and at the date of the mortgages and of the four leases next after mentioned, *W. H. Gibbs* was the mortgagor in possession of the entire property, which was laid out for building.

By four indentures of lease respectively dated the 29th of November, 1884, and made between the said *W. H. Gibbs* of the one part and *J. P. Flew* of the other part, the said pieces of land comprising the sites of the said houses Nos. 12, 14, 16, and 18 *Gledstanes Road*, and gardens, and the four houses recently erected thereon, were respectively demised to the said *J. P. Flew*, for the term of ninety-nine years from the 29th of September, 1883, at the yearly rent and subject to the covenants and conditions therein respectively contained, and on the part of the lessee to be performed and observed. Each of the said leases was made in consideration of the lessee having erected a new building on the land demised, and in all other respects the provisions of s. 18 of the *Conveyancing and Law of Property Act*, 1881, were complied with.

Under and by virtue of certain mesne assurances and acts in the law, the premises comprised in and demised by the said four leases became, in April, 1888, absolutely vested in the Plaintiff for the unexpired residue of the said terms respectively granted by the said leases, except the last day of each of the said terms.

By deed dated the 24th of December, 1886, and made between the said *L. Ruddle* and others (the mortgagees) of the one part, and the Defendants of the other part, the said land immediately adjoining and in the rear of the said houses and gardens, Nos. 12, 14, and 16 *Gledstanes Road* aforesaid (being part of the land included in the said mortgage of the 10th of August, 1883), was conveyed to the Defendants; and by deed dated the 4th of May, 1887, and made between the said *C. R. Luce* and others (the mortgagees) of the one part, and the Defendants of the other part, the said land immediately adjoining and in the rear of the said house and garden, No. 18 *Gledstanes Road* aforesaid (being part of the land included in the said mortgage of the 26th of October, 1883), was conveyed to the Defendants.

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Subsequently the Defendants erected on the boundary of their land adjoining the Plaintiff's said houses and in the rear thereof a hoarding which rose upwards of five feet above the top of Plaintiff's boundary fence which was six feet high. Thereupon the Plaintiff commenced this action, and by his statement of claim alleged that he was entitled to a free and uninterrupted access of light and air over the lands of the Defendants to the windows in the back of his houses, and claimed an injunction to restrain the Defendants, their servants and agents, from erecting or permitting to remain erected upon their land in the rear of the Plaintiff's said houses any hoarding or other erection which darkens or interferes with the access of light to any of the windows of the said houses as the same was enjoyed at the date of the said leases.

The Defendants by their statement of defence alleged that they purchased their land as building land, and that at the date of the said mortgages the lands comprised therein formed part of a building estate, and that at the date of the said leases, both the lessor and lessee well knew that the adjoining land was available and would probably be used for building purposes. They also relied on the fact that the mortgagees were not parties to the leases, and denied the Plaintiff's right to light. Issue was joined, and this was the trial of the action.

It appeared from the evidence that at the time the four leases were granted the land at the rear of the said houses had been laid out and turfed as a cricket ground—the building scheme being in abeyance—and was subsequently conveyed in that state by the mortgagees to the Defendants in 1886 and 1887, by the deeds above stated, but there was a conflict of evidence as to whether the building scheme had been definitely or only temporarily abandoned. There was direct evidence that the hoarding materially darkened and obstructed the access of light to the windows in the basement floors of the Plaintiff's four houses.

Neville, Q.C., and *A. àB. Terrell*, for the Plaintiff:—

The leases having been made in conformity with sect. 18 of the *Conveyancing Act*, 1881, are binding on the mortgagees,

although they were not parties to them, and, but for the building scheme, the principle of *Myers* v. *Catterson* (1) applies.

The evidence shews that at the date of the leases the building scheme had been abandoned, and the land, that was afterwards the Defendants', had been laid out as a cricket ground. The Plaintiff acquired with his leases an implied grant of light necessary for the due enjoyment of the houses: *Myers* v. *Catterson*. But even if there was an implied reservation by the lessor of the Defendants' land for building purposes, the hoarding has nothing to do with buildings, but is put up to prevent us from overlooking the cricket field.

Chadwyck Healey, Q.C., and *G. M. Freeman*, for the Defendants :—

The *Conveyancing Act*, 1881, is no authority one way or the other in this case. The object and effect of sect. 18 is to establish privity between the lessee and the mortgagee. Even if the mortgagees were parties to the leases, they and their assigns cannot be prevented from building on the Defendants' land. The building scheme was never definitely abandoned, and the lessee must be taken to have acquired his lease with notice that the adjoining land was part of the building scheme, and that his light might be obstructed by buildings: *Birmingham, Dudley, and District Banking Company* v. *Ross* (2); *Beddington* v. *Atlee* (3). This distinguishes the case from *Myers* v. *Catterson*. We have a right to put up the hoarding to preserve our rights and prevent the Plaintiff acquiring a prescriptive right to light.

ROMER, J. :—

The first question in this case that I have to consider is, whether the mortgagees were in any way bound or affected by the lease of the Plaintiff's house by the mortgagor in possession. Admittedly the lease is a good one under the Act. What is the effect then of a lease of this kind, if any, upon the mortgagees and the mortgaged property? I think it has the same effect, for the purpose I have now to consider, as if the mortgagees had

(1) 43 Ch. D. 470. (2) 38 Ch. D. 295.
(3) 35 Ch. D. 317.

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joined in the lease. The Act confers on the mortgagor a power to grant this lease, and the exercise of this power, in my judgment, is intended to bind, and does bind, the mortgaged property, and both the mortgagor and the mortgagee, just as in an ordinary real settlement the exercise of a power of leasing by trustees, although they might have no estate in the settled property, would bind all those entitled to the land under the limitations in the settlement. The result is that, in my judgment, the mortgagees and their assigns could not deal with the surrounding mortgaged property so as to interfere with the rights granted by the lease, which include, subject to the question I have next to consider, the right to the lights of the houses leased.

The next point I have to consider is this, What was the right to the lights granted by this lease? I will assume that the Defendants are right in saying that, under the circumstances at the date of the lease, all parties must be taken to have contemplated that the surrounding land in question would be utilized as building land, though I am bound to say that this is not clear, seeing that at the time this neighbouring land had been laid out and turfed as and for a cricket ground. But as I have said, taking the assumption in their favour, what follows? It appears to me only this, that the right to light granted by the lease is not such as to prevent the neighbouring land being built upon and used as building land; but, subject to this, the right to the light was in my judgment granted, and must not be interfered with by the owner, for the time being, of adjacent land. I think this follows from the principle laid down in *Myers* v. *Catterson* (1). Then, if that be so, what are the Defendants doing with this adjacent land? Are they interfering with the Plaintiff's light by building as they are entitled to build, according to the assumption I have been making in their favour? No; they have been putting up a hoarding in order to prevent the tenants of the house looking into the cricket field. It appears to me that if this substantially interferes with the light coming to the basement windows of the Plaintiff's houses, the Defendants are doing that which they are not entitled to do, and ought to be restrained. The last question,

(1) 43 Ch. D. 470.

therefore, I have to consider is, whether there has been by this hoarding a substantial interference with the light coming to the basement windows of the Plaintiff's houses. I think there has been a substantial interference with that light. I need not refer to the evidence in detail. The witnesses on behalf of the Plaintiff gave their evidence well, and I think the model which is in evidence in this case strongly confirms their testimony. On the other hand, the expert who was called on behalf of the Defendants was, I think, shaken in his views by the cross-examination, and I do not think his testimony can be put as, to any material extent, fairly meeting the evidence adduced on behalf of the Plaintiff. The result is, I grant an injunction to restrain the Defendants from continuing the erection of this hoarding, and order them to pay the costs of the action.

Solicitors for Plaintiff: *J. L. Tomlin & Son.*
Solicitors for Defendants: *Bedford, Monier-Williams & Co.*

H. L. F.

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[1890 A. 1159.]

Drainage—Local Authority—Allowing Sewage to cause Nuisance in adjoining District—Injunction—Stopping existing Drains—Compelling Legal Proceedings — Compelling performance of Public Duties—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 85, 86, 250 [*Revised Ed. Statutes, vol. xii., pp.* 673, 679, 726]—*Nuisances Removal Act,* 1855 (18 & 19 *Vict. c.* 121), *ss.* 8, 11, 12 [*Revised Ed. Statutes, vol. xii., pp.* 739, 740, 741].

A detached portion of the parish of *C.* had no separate main drainage system, but certain houses therein were drained by means of pipes carrying the sewage into cesspools, the overflow pipes from which communicated with main pipes within such detached portion. The drainage of the houses, including such communications, was constructed with the sanction of the *C.* Vestry, as the local authority under the *Metropolis Local Management Act,* 1855. The main pipes communicated with watercourses within the adjoining district of the *F.* Local Board, and the sewage from the cesspools passed through the main pipes into the watercourses, and caused a nuisance in such adjoining district.

The *F.* Local Board brought an information and action (to which the

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owners and occupiers of the houses were not parties) against the *C.* Vestry, for an injunction to restrain them from permitting, authorizing, or directing any sewage to pass from the detached portion of *C.* into the watercourses so as to cause a nuisance:—

Held, (*a*) following the opinions expressed in *Attorney-General* v. *Guardians of Poor of Union of Dorking* (1), *Attorney-General* v. *Acton Local Board* (2), and *Charles* v. *Finchley Local Board* (3), that the *C.* vestry could not stop up the communications which they had sanctioned:

Held, (*b*) that, inasmuch as the cesspools and drains were acting properly *quâ* cesspools and drains, no proceedings could be successfully taken by the *C.* Vestry against the owners or occupiers of the houses under sect. 85 of the *Metropolis Local Management Act*, 1855; and that, as the cause and effect of the nuisance were not both within the area of the jurisdiction of the *C.* vestry, it was doubtful whether proceedings could be taken by them against the owners or occupiers of the houses under the *Nuisances Removal Act*, 1855:

Held, (*c*) that, assuming the *C.* Vestry could take proceedings under the *Metropolis Local Management Act*, 1855, or the *Nuisances Removal Act*, 1855, *Attorney-General* v. *Guardians of Poor of Union of Dorking* (4) was an authority that the vestry could not be compelled by injunction to take such proceedings:

Held, (*d*) on the authority of *Glossop* v. *Heston and Isleworth Local Board* (5), that it was not ground for an injunction that the *C.* Vestry were not exercising or performing their other statutory powers and duties:

Held, therefore (on the *C.* Vestry undertaking not to sanction communications in future between houses within the detached portion of their parish and the main-pipes therein, until further order or without the consent of the *F.* Local Board), that the claim for an injunction failed.

THE local board for the district of *Friern Barnet* were the urban sanitary authority for that district, and the vestry of the parish of *St. James* and *St. John, Clerkenwell*, were the local authority for that parish.

A detached portion of the parish of *Clerkenwell*, called "*Clerkenwell Detached*," adjoined the south side of the district of the *Friern Barnet* Local Board.

On one side of *Clerkenwell Detached*, and extending beyond it into the *Friern Barnet* district, there was an open ditch or watercourse.

On the other side of, but within *Clerkenwell* district, there was a closed drain or sewer, which ran into another watercourse in the *Friern Barnet* district.

(1) 20 Ch. D. 595, 606.
(2) 22 Ch. D. 221, 232.
(3) 23 Ch. D. 767, 777.
(4) 20 Ch. D. 595, 609.
(5) 12 Ch. D. 102.

Within *Clerkenwell Detached* several houses were built about the end of 1887.

There was no system of main drainage within *Clerkenwell Detached*. The sewage from the houses passed through pipes into cesspools, and the cesspools had overflow-pipes connected with sewers or drains (including the closed drain or sewer above mentioned), laid down in certain new roads within *Clerkenwell Detached*. These roads had been laid out by the owners of land within *Clerkenwell Detached*, but had not been taken over by the *Clerkenwell* Vestry.

The cesspools and the drainage communications (by means of the overflow-pipes) between the cesspools and the sewers or drains within *Clerkenwell Detached* were constructed with the sanction of the *Clerkenwell* Vestry, as the local authority of *Clerkenwell Detached*, under the *Metropolis Local Management Act*, 1855.

The sewers or drains communicated with the watercourses within the *Friern Barnet* district, and the sewage from the cesspools passed through the sewers or drains into the watercourses, causing a nuisance within the *Friern Barnet* district.

An information and action were brought by the local board for the district of *Friern Barnet*, against the *Clerkenwell* Vestry, for an injunction to restrain the Defendants, their servants and agents, from permitting, authorizing, or directing any sewage to flow or pass from the detached portion of *Clerkenwell* parish into the watercourses, or either of them, so as to cause a nuisance to the public or danger to the public health.

The trial took place before Mr. Justice *Romer* on the 16th and 20th of July, 1891.

Haldane, Q.C., and *Chubb*, for the Plaintiffs:—

The district of the Defendants is within the area governed by the *Metropolis Local Management Act*, 1855 (18 & 19 Vict. c. 120). The main-pipes in the roads within *Clerkenwell Detached*, with which the overflow pipes from the cesspools communicate, are sewers within sect. 250 of that Act, which provides that "sewer" shall "mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted" by the same section, applies.

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The main-pipes, as sewers, are vested in the Defendants, as the vestry of the parish, by sect. 68; and by sect. 69 the vestry are to repair and maintain the sewers vested in them, and "shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district." The same section empowers the vestry to carry such sewers or works across roads and streets, and through lands, making compensation for the damage done, and to "improve or alter all or any of the sewers, watercourses, and works which shall be from time to time vested in them or subject to their order and control, and to discontinue, close up, or destroy such of them as they may deem to have become unnecessary. Sect. 86 requires the vestry to "drain, cleanse, cover, or fill up, or cause to be drained, cleansed, covered, or filled up, all ponds, pools, open ditches, sewers, drains, and places containing or used for the collection of any drainage, filth, water, matter, or thing of an offensive nature, or likely to be prejudicial to health, which may be situate in their parish." The same section directs the vestry to give notice to the owner or occupier of premises whereon the nuisance exists, to cleanse such sewer or drain, or to construct a proper sewer or drain for the discharge of the filth, or to do such other works as the case may require; and after non-compliance with the notice, the vestry are to "execute such works as may be necessary for the abatement of such nuisance," and may recover the expenses from the owners of the premises. Whatever other remedies the Defendants have, they can, notwithstanding the fact of their having sanctioned the communications between their main-pipes and the cesspools, stop up such communications when they cause a nuisance: *Charles* v. *Finchley Local Board* (1). The fact of their having sanctioned the communications does not justify their allowing an outflow of sewage into the Plaintiffs' district. Moreover, the Defendants have other powers of dealing with the evil. By sect. 85 of the *Metropolis Local Management Act*, 1855, they are empowered to do, or cause the owners of the premises to do, any works which may be necessary, by reason of a drain or cesspool appearing "to be in bad order and condition,

(1) 23 Ch. D. 767.

or to require cleansing, alteration, or amendment." Further powers are given to the vestry by the *Nuisances Removal Act*, 1855 (18 & 19 Vict. c. 121). Sect. 8 defines the nuisances to which the Act relates, including "premises in such a state as to be a nuisance or injurious to health," and any watercourse, cesspool, or drain, "so foul as to be a nuisance or injurious to health." Sect. 11 gives the vestry power to enter premises:—(*a*) to ground proceedings, when their officers have reasonable grounds for believing that a nuisance exists on any private premises; (*b*) to examine premises where a nuisance exists, to ascertain the course of drains, and to execute or inspect works ordered by justices to be done under the Act; (*c*) to remove or abate a nuisance in case of non-compliance with or infringement of the order of justices; and sect. 12 directs proceedings to be taken before justices of the peace. The statutory provisions referred to shew that the Defendants have full power to enter on private premises, and physically deal with a nuisance or means of nuisance.

Reid, Q.C., *Chadwyck Healey*, Q.C., and *Edward Clayton*, for the Defendants:—

The main-pipes are not "sewers" within s. 250 of the *Metropolis Local Management Act*, 1855. By that section "drain" includes "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." Although sect. 74 does not give the vestry power to order drainage by a combined operation except in the case of existing houses, yet where, as in this case, the case is not within sect. 74, but within sect. 76, the approval of the scheme is an order, and the main-pipe is a drain and not a sewer, and does not vest in the vestry: *Bateman* v. *Poplar District Board of Works* (1). The Defendants are not liable to an injunction on account of mere omissions or neglect—*e.g.*, to provide proper means of disposing of the sewage—when they do not themselves cause the nuisance: *Glossop* v. *Heston and Isleworth Local Board* (2). Having sanctioned the communications between the cesspools and the main-pipes, it is at least doubtful whether the

(1) 33 Ch. D. 360. (2) 12 Ch. D. 102.

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vestry can stop up or cut off such communications: *Attorney-General* v. *Acton Local Board* (1); *Charles* v. *Finchley Local Board* (2). Where a person has been led to incur expense in consequence of having obtained a license from another to do an act, the other cannot recall his license—a license executed is not countermandable: *Winter* v. *Brockwell* (3). An injunction will not be granted against a public body, even if they neglect their duty to provide a sufficient sanitary scheme for the neighbourhood; nor can an action be maintained against them, to compel them to obtain an injunction against a third party: *Attorney-General* v. *Guardians of Poor of Union of Dorking* (4). The Plaintiffs rely on *Charles* v. *Finchley Local Board* (5); but there it was held that there was a right to stop up the communication because the occupier had only obtained leave to send surface-water through it, and had abused his license by sending surface-water mixed with sewage (6). The Defendants could not proceed under the *Nuisances Removal Act*, 1855, for the nuisance is within the Plaintiffs' district; and proceedings for the removal and prevention of nuisances can only be taken when both the cause and effect of such nuisance are within the area of the jurisdiction of the local authority: *Reg.* v. *Cotton* (7). But the Plaintiffs are not without a remedy; for, although they cannot proceed under the *Nuisances Removal Act*, 1855, they can take proceedings before the justices under sect. 108 of the *Public Health Act*, 1875. Their reason for not doing so is that they want to put pressure on the Defendants to adopt a main-drainage scheme.

Chubb, in reply:—

The Plaintiffs are clearly entitled to an injunction to restrain the Defendants from sanctioning communications in future between cesspools and the main-pipes.

[*Reid*:—The Defendants will undertake not to sanction further communications.]

(1) 22 Ch. D. 221, 232.
(2) 23 Ch. D. 767, 777.
(3) 8 East, 308.
(4) 20 Ch. D. 595, 605.
(5) 23 Ch. D. 767.
(6) Ibid. 775.
(7) 28 L. J. (M.C.) 22.

The Plaintiffs are also entitled to an injunction in respect of the communications already sanctioned. The Defendants are responsible for the disposal of all the sewage within their district, and yet by sanctioning these communications they throw on a neighbouring district the burden of removing the sewage while they are themselves taking rates in respect of the houses from which the sewage comes. *Attorney-General* v. *Guardians of Poor of Union of Dorking* (1) is not an authority in favour of the Defendants. In that case there were prescriptive rights to pass the sewage, and an injunction was held not to be the proper remedy; but here the Defendants have created the nuisance by sanctioning a scheme which involves sending their sewage into another district. Notwithstanding the sanction they have given, the Defendants may alter the works which have been sanctioned; and it is not for the Plaintiffs or the Court to say how the work is to be done: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (2).

Drainage by means of a cesspool was only intended to be authorized as a temporary provision for the drainage: 25 & 26 Vict. c. 102, s. 66. *Glossop* v. *Heston and Isleworth Local Board* (3) only decides that a local authority cannot be compelled by injunction to alter the drainage system of their whole district; but the Plaintiffs are not asking the Defendants to do that. They may be compelled to alter the drainage of specific houses if it occasions a nuisance. The Defendants are in no better a position than a private landowner who caused a nuisance would be: *Attorney-General* v. *Acton Local Board* (4).

ROMER, J.:—

Undoubtedly, in this case there is a nuisance caused to the Plaintiffs' neighbourhood and district.

The nuisance is caused in this way: Certain houses in the Defendants' district empty their cesspools, by connecting-pipes, into certain main-pipes which pass along the roads of the Defendants' district, and which pipes are ultimately connected with, and discharge the sewage into, certain brooks which flow into the Plaintiffs' district.

(1) 20 Ch. D. 595, 605.
(2) Law Rep. 4 Ch. 146.
(3) 12 Ch. D. 102.
(4) 22 Ch. D. 221.

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Now, clearly the Plaintiffs would have a remedy to stop this nuisance as against the persons actively committing it—that is to say, against the occupants or owners of the houses whose sewage is being turned into the brooks in the manner I have mentioned.

The Plaintiffs could, by taking proceedings against the occupants of the houses, stop the nuisance, either by a Common Law action, or by proceedings under sect. 108 of the *Public Health Act*, 1875.

But the question before me is, whether an injunction should go against the Defendants, who are said to permit the sewage which causes the nuisance to pass through their main-pipes.

It is said that the Defendants are liable because they could stop the sewage flowing through the main-pipes which empty into the brooks, and which main-pipes are said to be vested in them. I will assume for the purposes of this judgment that the main-pipes are so vested; but I do not decide it—it appears to be an arguable point.

Assuming this, it is then said that the Defendants could stop the nuisance by cutting off the communications by the overflow-pipes between the cesspools of the houses and the main-pipes, and that the case before me is governed by *Charles* v. *Finchley Local Board* (1). But, in my opinion, that case is different from the present one. There the local board could rightly, and without risk of any proceedings being brought against them, have physically stopped the communication between their pipes and the place from which came the sewage which caused the nuisance, and could so have stopped the nuisance to the plaintiffs; for the local board in that case had agreed to allow the communication only for the purpose of passing pure water. But here the Defendants had, before action brought, granted permission to make the communications between the houses and the main-pipes, and consented to those communications being used for the purposes for which, and as, they are now being used; and I cannot see that, having given that consent, the Defendants could now cut off or stop up those communications; for this is not a case of permission to use them to pass pure water only. That point

(1) 23 Ch. D. 767, 777.

seems to have been already considered. In *Attorney-General* v. *Acton Local Board* (1), Lord Justice *Fry*, then Mr. Justice *Fry*, says this: "Moreover, I am by no means clear that the defendants have powers to stop up a drain the construction of which they have once authorized or directed. I observe that the Master of the Rolls expressed that view in *Attorney-General* v. *Guardians of Poor of Union of Dorking* (2). Therefore, on that ground also I should hesitate very long before I granted the mandatory injunction which is asked for."

And again, in *Charles* v. *Finchley Local Board* (3), upon which the Plaintiffs rely, the point was considered by Mr. Justice *Pearson*, who says: "I do not hesitate to say that if the facts here were such as they were before Mr. Justice *Fry*, namely, that the communication had been made with the leave and license of the board, I should have followed the doubts expressed by the Master of the Rolls, and concurred in by Mr. Justice *Fry*, most readily, and should have refused to grant an injunction." That being so, it appears to me that under the circumstances of the case before me I ought not to grant the injunction asked for.

But it is then said that there is a possibility of the Defendants giving permission for future communications between the main pipes and other houses which may be erected, so that the nuisance might be increased by something which the Defendants might consent to or do hereafter. With regard to that, the Defendants' counsel have at the Bar offered an undertaking, which I accept, that they will not (of course until further order of the Court, or without the Plaintiffs' consent) permit any further communications between houses and the main-pipes.

The Plaintiffs are not satisfied with that, and they further insist that the injunction ought to be granted against the Defendants in respect of the existing communications on some further grounds, which I will shortly consider.

It is said that the Defendants could and ought to stop the nuisance by taking proceedings against the occupants of the houses, either under sect. 85 of the *Metropolis Local Management Act*, 1855, or under sect. 11 of the *Nuisances Removal Act*, 1855.

(1) 22 Ch. D. 232. (2) 20 Ch. D. 595, 606.
(3) 23 Ch. D. 767, 777.

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As to sect. 85 of the *Metropolis Local Management Act*, 1855, I do not see how the Defendants could successfully proceed under that section. The section appears to be aimed at proceedings where any drain, cesspool, or privy is in bad order or condition, or requires cleaning, altering, amendment, or to be filled up. In the case before me the drains, cesspools, and the overflow-pipes seems to have been acting very well. There appears to me to be no ground for the Defendants attacking the cesspools and drains *quâ* cesspools and drains; and I do not think that sect. 85 would enable the Defendants to take the proceedings which the Plaintiffs insist they ought to take.

Again, as to the *Nuisances Removal Act*, 1855, I doubt whether the Defendants could proceed successfully, seeing that the nuisance which they are asked to stop, or in respect of which they are asked to proceed, is not within their own district. But, assuming the Defendants could take proceedings under either of the sections to which reference has been made, I do not think an injunction ought to be granted against them to compel them to take such proceedings. That point has been considered, and is dealt with by Lord Justice *Cotton* in *Attorney-General* v. *Guardians of Poor of Union of Dorking* (1). Lord Justice *Cotton* there says: "But it is said that they can prevent this being done, and therefore that an injunction ought to be granted for the purpose, as I understand the argument, of compelling them to exercise for the benefit of the plaintiff those rights which they have of preventing the nuisance. It is said that they may do it in two ways; one is by bringing an action or taking proceedings under the powers of the Act against the persons who are in fact causing the nuisance by sending their sewage into the stream. The Master of the Rolls has dealt with this part of the case. Except where a person had bound himself by contract to bring an action (which of course is a different question) I never heard of any one bringing an action against a person because that person did not bring an action which the plaintiff could bring himself, and if here there is a nuisance committed by the persons who are sending their sewage either *de novo* or continuing to send it into the sewer and thence into the stream,

(1) 20 Ch. D. 595, 609.

the plaintiff can bring an action just as well as the defendants, except that it is said he has not the same knowledge; but does the fact that the defendants know of evidence which the plaintiff does not, entitle the plaintiff to bring an action against the defendants for not bringing an action which the plaintiff himself at law may bring, although he may have some difficulty in proving his case? I never heard of any such principle, and in my opinion it does not exist." Therefore, it appears to me that I ought not on that ground to grant the injunction asked for.

It is further said that the Defendants could exercise other powers which they have of altering or dealing with the drainage in their district, so as to prevent the necessity of these houses draining into the present main pipes. But this, again, is not a proper ground for granting an injunction against the Defendants. It would be, in effect, granting an injunction against the Defendants in order to compel them, for the benefit of the Plaintiffs, to perform their statutory or other duties. That very point was dealt with in *Glossop* v. *Heston and Isleworth Local Board* (1), and I need not further consider it. It is not ground for granting an injunction against the local board that the local board are not properly exercising their powers or performing their duties.

It follows that all the reasons urged before me, for granting an injunction in this case against the Defendants, fail. Therefore, accepting the undertaking which I have mentioned, I have only to consider the question of costs. On the whole of the facts, bearing in mind that neither party has wholly succeeded, and that the Defendants have put the Plaintiffs to the trouble of proving the nuisance in fact, as to which they have succeeded, I think I ought to make no order as to costs.

Solicitors: *G. D. Byfield; Boulton, Sons, & Sandeman.*

(1) 12 Ch. D. 102.

F. E.

ROMER, J.
1891
July 25.

In re INDIAN MECHANICAL GOLD EXTRACTING COMPANY.

[1891 I. 0231.]

Company—Alteration of Memorandum of Association—Confirmation by Court—Condition imposed—Change of Company's Name—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.

On confirming an alteration in the memorandum of association of a company, the effect of which was to enlarge the area of the company's operations, the Court imposed the condition that the name of the company, which indicated that its operations were limited to one country, must be altered so as no longer to contain such a suggestion.

PETITION by the company asking for the confirmation by the Court of a proposed alteration in its memorandum of association.

The company was registered under the *Companies Acts*. Among the objects for which it was established, as defined by the memorandum of association, was the acquisition of the right to use and work any patents relating to the separation of gold and other metals granted, or to be granted, to *M. Crawford*, to work the invention thereby protected, and to do all or any of the matters or things mentioned in the memorandum in any part of the world, "with the exception that the working of the patent rights acquired, or to be acquired, as aforesaid, shall be confined to the Empire of *India*."

It was considered desirable to remove this restriction, and the company had passed a special resolution to alter the memorandum by striking out from it the words above quoted.

The petition stated, that *Crawford* was the patentee of the patents acquired by the company, and that he had no objection to the proposed alteration in the area of the company's operations. The petition also stated that the company had only two creditors, whose names were given, and that they consented to the proposed alteration.

The petition was not served on any one.

Application had been made to the Judge in Chambers for

directions, and he considered that it was not necessary to give notice to any person or class of persons under sect. 1, sub-sect. 2 (*a*) of the Act 53 & 54 Vict. c. 62.

There was evidence that *Crawford* did not object to the alteration, and that the only creditors of the company were their solicitors, the other creditors mentioned in the petition having been paid since its presentation.

G. J. Duncan, for the petition :—

The jurisdiction of the Court to sanction the proposed alteration arises under sect. 1 of the *Companies (Memorandum of Association) Act*, 1890 (1).

[ROMER, J. :—I think if this alteration is made, and the company carries on its operations elsewhere than in *India*, its present name will be misleading, for it suggests that the operations are limited to *India*. I think the name ought to be altered in such a way as to indicate that the sphere of the company's operations is not limited to *India*.

Frank Evans, amicus curiæ, referred to *In re Foreign and Colonial Government Trust Company* (2) in which Mr. Justice *Stirling* in a similar case, required the name of the company to be altered.]

The company is willing to alter the name, either by omitting

(1) 53 & 54 Vict. c. 62. Sect. 1 : (1). "Subject to the provisions of this Act, a company registered under the *Companies Acts*, 1862 to 1886, may, by special resolution, alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, or alter the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, either with or without any such alteration as aforesaid with respect to the objects of the company, but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding-up the company."

(3). "An order confirming any such alteration may be made on such terms and subject to such conditions as to the Court seems fit, and the Court may make such orders as to costs as it deems proper."

(5.) "The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company" (*inter alia*)

(c.) "To enlarge or change the local area of its operations."

(2) [1891] 2 Ch. 395.

ROMER, J. 1891 *In re* INDIAN MECHANICAL GOLD EXTRACTING COMPANY.

the word "Indian," or by inserting after that word the words "and general."

ROMER, J.:—

I think either of those alterations of the name will answer the purpose. I will confirm the alteration of the memorandum, but the order will not go till the alteration of name has been made. When this has been done, the petition may be mentioned to me again at any time.

Solicitors: *Andrew, Wood, & Co.*, agents for *Andrew & Trotter, Lincoln.*

W. L. C.

ROMER, J. 1891 *July* 17, 29.

BELLAMY *v.* DAVEY.

[1891 B. 2577.]

Contract to make an Article on Premises of Purchaser—Sub-contract—Property in incomplete Article—Lien for Purchase-money.

A. contracted with the *B. Company* to erect two specified tanks on *C.*'s premises, to be paid for after completion. The *B. Company* contracted with *C.* to erect the tanks specified, to be paid for after completion. When *A.* had partly constructed the tanks, a receiver of the property of the *B. Company* was appointed in a debenture-holder's action. The *B. Company* were insolvent. The tanks were not fixed to the soil, but were too heavy to move:—

Held, that the property in the incomplete tanks was in *A.*, and that he had a lien on the purchase-money that would be payable by *C.* for his purchase-money.

THE Plaintiff had contracted with *Bramham & Peech, Limited*, Defendants to the action, to erect on *Rowatt's* wharf, the wharf of *Davey & Goulden*, Defendants to the action, two petroleum tanks. The other Defendants to the action were three persons, *Hunt, Howard* and *Russell*, who held debentures of *Bramham & Peech, Limited*, dated January, 1888, whereby the company charged all its property and undertaking, whatsoever and wheresoever, present and future. The Defendants *Hunt, Howard*, and *Russell* held all the debentures of the Defendant company.

In May, 1890, *Bramham & Peech, Limited*, contracted with

Davey & Goulden to erect on *Rowatt's* wharf two petroleum tanks in accordance with certain drawings and specifications. The terms of the contract were contained in the following letter from *Bramham & Peech, Limited,* to *Davey & Goulden,* dated the 27th of May, 1890, which was confirmed in writing by *Davey & Goulden*: "We are obliged by your order for two steel petroleum oil storage tanks, each 40 feet diameter and 26 feet deep, in accordance with the drawings and specifications, the work throughout being finished in first-class manner, and left ready for testing with water in the usual way, on the foundation prepared by you at your wharf, for the sum of ninety pounds (£90) in cash and sixteen hundred pounds (£1600) in acceptances as follows, each payment dating from the date of each tank being completed ready for testing, viz., £45 in cash for each tank within three days of date of completion:—

"£200 in three months' bill from same date.
"£200 „ six „ „
"£200 „ nine „ „
"£200 „ twelve „ „

The payment for the second tank being exactly the same."

Bramham & Peech sub-contracted with the Plaintiff for the erection of the tanks according to the drawings and specifications supplied to *Davey & Goulden.* The terms of the contract between the Plaintiff and *Bramham & Peech, Limited,* were contained in the following extract from a letter dated the 24th of August, 1890, from *Bramham & Peech, Limited,* to the Plaintiff, and the documents therein referred to: "We accept your offer to supply and erect on *Rowatt's* wharf, *Bow Bridge, Stratford, E.,* two steel petroleum oil storage tanks, each 40 feet diameter × 26 feet deep, in accordance with the drawings and specifications, the work throughout being finished in first-class manner, and left all ready to test with water in the usual way, for the sum of seven hundred and sixty-five pounds (£765) each nett, payable as follows, the date in each case being taken from date of each tank being completed and ready for testing:—

"50% within 14 days by cheque.
"25% by 3 months' bill } *plus* the current rate of
"25% by 6 „ „ } interest discount."

ROMER, J.
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The Plaintiff commenced to construct two tanks in accordance with his contract on the premises of Messrs. *Davey & Goulden.* They were built up of steel plates on a level concrete foundation, not fixed in any way to the concrete otherwise than by their own weight, which would be when completed so great as to make it practically impossible to move them without taking them to pieces. At the time the writ in this action was issued and the time the motion first came on, one tank (as the Judge held on the evidence) was nearly, but not quite, completed; the other had been partly constructed.

No interest had been paid on the debentures of *Bramham & Peech,* and on the 28th of May, 1891, the Defendant *Hunt,* suing on behalf of himself and the other debenture-holders, commenced an action against *Bramham & Peech, Limited,* to enforce their security; and on the 5th of June, 1891, a receiver of the assets of *Bramham & Peech, Limited,* was appointed in that action. It was admitted that *Bramham & Peech, Limited,* were insolvent.

The writ in this action was issued on the 4th of June, 1891; it was indorsed with a claim for a declaration that the two petroleum tanks in course of construction on the premises of *Davey & Goulden* were the property of the Plaintiff, and that, on the completion of each of the tanks and delivery thereof to *Davey & Goulden,* the Plaintiff would be entitled to a lien upon the purchase-money payable by *Davey & Goulden* to *Bramham & Peech, Limited,* for the purchase-money payable by *Bramham & Peech, Limited,* to himself; and an injunction to restrain the Defendants *Bramham & Peech, Limited,* or the debenture-holders, from receiving, and the Defendants *Davey & Goulden* from paying, the purchase-money payable by the latter without first satisfying or securing the purchase-money payable to him, and for a receiver.

A motion was made on behalf of the Plaintiff for an injunction and a receiver, in accordance with the indorsement on the writ. On the motion coming on before Mr. Justice *North,* it was arranged that the tanks should be completed by the Plaintiff, and that he should be paid the cost of completion in any event; that the motion should stand over, that the parties might have all legal questions in dispute argued on the motion, the parties being

desirous of settling their rights out of Court when the legal points were decided.

The motion was now heard by Mr. Justice *Romer*, sitting for Mr. Justice *North*, for the purpose of obtaining declarations as to the rights of the parties.

Rigby, Q.C., and *H. Terrell*, for the Plaintiff:—

Neither of the two tanks has been completed or delivered; they are not fixtures; the property in them, therefore, remains in the Plaintiff: *Wood* v. *Bell* (1).

On the principle on which the right of stoppage *in transitu* is founded, the Plaintiff has the right (though he may not do anything to put it out of his power to complete the contract) to hold the goods till he is paid: his right is, in fact, higher than the right to stop *in transitu*, for the property is still in him and the goods have not been handed over to a carrier: *Bloxam* v. *Sanders* (2); *Benjamin* on Sales (3).

That he has a right of lien on the purchase-money if he can stop or hold the goods is established by *Ex parte Golding, Davis & Co.* (4).

C. T. Mitchell, for *Davey & Goulden.*

Eve, for *Bramham & Peech, Limited.*

Cozens-Hardy, Q.C., and *Dundas Gardiner*, for the debenture-holders:—

If there has been no completion and delivery at all, the property in the tanks, so far as erected, is in *Davey & Goulden*; they have at least the possession. The tanks are not in a position to be personally held or stopped *in transitu* by the Plaintiff; no right, therefore, analogous to a right to stop *in transitu* can exist: *Benjamin* on Sales (5).

[ROMER, J.:—A builder who has placed bricks or other material on another person's land in order to carry out a con-

(1) 6 E. & B. 355.
(2) 4 B. & C. 941.
(3) 4th Ed. p. 679.
(4) 13 Ch. D. 628.
(5) 4th Ed. pp. 679, 783.

ROMER, J. 1891 BELLAMY v. DAVEY.

tract is, on the insolvency of the person with whom he is contracted, entitled to remove the material.]

We do not dispute that. Here the contractor cannot remove the tanks in mass; he cannot break them up: that would be putting it out of his power to complete. Under the circumstances of this case an intention of the parties that the property should pass is to be presumed.

It is doubtful whether *Ex parte Golding, Davis & Co.* (1) is good law: *Kemp* v. *Falk* (2).

July 29. ROMER, J.:—

The facts of the case are simple. The Plaintiff enters into a contract with the Defendant company, the short effect of which is that the Plaintiff is to build and deliver on completion, and when ready for testing, two tanks. The tanks were to be of a large size, and when completed would be probably too heavy to be conveniently moved, and the contract provides for the tanks being erected on the premises of the persons who were to use them—that is to say, on the wharf of the Defendants, *Davey & Goulden*. By the terms of the contract, the purchase-money is to be paid by instalments in a way which gives certain credit to the company, the instalments being made payable at certain periods after the time when the tanks are completed. By another contract between the company and *Davey & Goulden*, the company had contracted to erect the two tanks on the latter's premises for them on certain terms of payment, which are not identical with those in the Plaintiff's contract. It is clear on the evidence that these tanks are not fixtures. They rest, as they are being made, and on completion, by their own weight alone, on the place where they are erected. The Plaintiff commenced to erect the two tanks on *Davey & Goulden's* wharf. One was nearly but not quite completed, and the other only just begun, when the company became insolvent. What was the Plaintiff bound to do? It is clear that if the property in the tanks, so far as erected, as well as actual possession thereof, had not passed to the company or to *Davey & Goulden*, the Plaintiff was not bound, as between himself and the company, after notice

(1) 13 Ch. D. 628. (2) 7 App. Cas. 573, 581.

of the company's insolvency, to deliver up the tanks without being paid. In this case, had the property passed? I think not. The contract was for sale and delivery of a complete tank ready for testing, and until the tank was so completed and delivered up, I think no property passed. And I think the fact that by arrangement the tank was being made on the premises of the ultimate purchaser did not make the uncompleted tank the property of the ultimate purchaser or of the company. This being so, it appears to me that on the company becoming insolvent, the Plaintiff had the right (with the consent of *Davey & Goulden*, which was given) to continue to complete the tanks, and then to say to the company, "I shall not part with the property, giving credit to you, but only on receiving actual payment of the price." As between the Plaintiff and *Davey & Goulden* questions might arise; but, fortunately, I am spared this.

The Plaintiff does not wish to insist on any rights incompatible with those of *Davey & Goulden*. The Plaintiff is willing to complete and deliver the tanks to *Davey & Goulden* on having the purchase-money payable by *Davey & Goulden* under their contract first applied (according to the principle laid down in *Ex parte Golding, Davis & Co.* (1)) in paying the purchase-money under the Plaintiff's contract, leaving the surplus (for there will be one) available for the company and their creditors. I think this really sets forth what the rights of the parties were when the action was begun. On the interlocutory application, before Mr. Justice *North*, he arranged that the Plaintiff should complete the tanks, having in any case a first charge for the expenses of completion, leaving the other rights of the parties to be determined on the further hearing of the motion. The motion now comes on for final disposal, and all parties join in asking me to declare the rights of the parties, and so end the action; and this I have consented to do.

It appears to me to follow from what I have said that the Plaintiff, as between himself and the company, was and is not bound to complete and deliver over the tanks without having his purchase-money paid to him or secured by a first charge on the purchase-money payable by *Davey & Goulden*, and I so declare.

(1) 13 Ch. D. 628.

ROMER, J. 1891 BELLAMY v. DAVEY.

And then, as the rights of *Davey & Goulden* come in, and the company and those claiming through them, are anxious that the tanks now being completed should be, as soon as possible, handed over to *Davey & Goulden* in terms of the latter's contract, in determining the rights of the parties, I think it will be proper for me to order, as I do, that the money payable by *Davey & Goulden*, whether in form of cash or acceptances, shall stand charged, in the first place, with payment to the Plaintiff of the purchase-money payable to him under his contract, and that, upon *Davey & Goulden* paying their purchase-money according to their contract, the Plaintiff having such charge shall, on completion, deliver to them the tanks. I was told that, upon ascertaining what their rights were, the parties could then easily carry the transaction out, and so I suppose the declarations I have made are all that is now needed to determine the action; but, inasmuch as there may possibly be some difficulty arising, which is not now foreseen, or some necessity for the appointment of a receiver of the purchase-moneys payable by *Davey & Goulden*, I give liberty to apply. Then, as to costs, the Plaintiff must pay the costs of *Davey & Goulden* and add them to his own, and have a charge for his own costs, and those he pays to *Davey & Goulden*, on the purchase-moneys payable by *Davey & Goulden*. The costs will be taxed, of course, as between party and party. The company and its debenture-holders, who sought to obtain the Plaintiff's tanks without paying for them, must bear their own costs.

Solicitors for Plaintiff: *Lumley & Lumley.*
Solicitors for *Davey & Goulden*: *Simpson, Palmer, & Winder.*
Solicitor for *Bramham & Peech, Limited*: *James Curtis.*
Solicitor for the debenture-holders: *H. Montagu.*

D. P.

In re MILNER'S SETTLEMENT.

ROMER, J.

1891

July 31.

[1891 M. 1081.]

Married Woman—Restraint on Anticipation—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.

Restraint on anticipation of property settled on a married woman for life, with remainder to her husband for life, was, under the circumstances, removed till further order, to the extent of allowing the income to be applied in payment of premiums on policies on the husband's life, and towards keeping down interest on mortgages in which she had purported to join with her husband, on the mortgagees undertaking to reduce the rate of interest, and not to enforce payment of the principal without leave of the Court.

AN indenture of settlement, dated the 17th of February, 1882, was made in contemplation of the marriage which shortly afterwards took place between *Edward Milner*, and his wife *Anne Matilda Eliza*, who was then under twenty-one years of age. The intended husband and wife were both parties to the settlement. By the settlement it was agreed and declared that if the intended wife then was, or she or her intended husband in her right should at one and the same time and from the same source become seised or possessed of or entitled to any real or personal property of the value of £200 or upwards, the same should be settled in trusts, therein declared, being trusts in favour of Mrs. *Milner* for life for her separate use, without power of anticipation with remainder over in favour of her husband *Edward Milner*, and of her children, and in default of children with remainder over. Mrs. *Milner* came of age in September, 1883; she executed a Deed Poll dated the 19th of October, 1883, confirming the marriage settlement.

Under the will and codicil of *Charles Burslem Saunders*, who died in December, 1888, Mrs. *Milner* became entitled to certain property.

By indentures of mortgage and further charges, respectively dated the 14th of February and 14th of March, 1890, made between Mrs. *Milner* of the first part, *Edward Milner* of the second part, and *John Robins* of the third part, Mrs. *Milner*

ROMER, J. 1891 *In re* MILNER'S SETTLEMENT.

purported to assign her interest in the estate of *Charles Burslem Saunders* to secure the payment of £2000 advanced by *John Robins*, and interest at the rate of 6 per cent. per annum.

By an indenture dated the 23rd of August, 1890, between Mrs. *Milner* of the first part, *Edward Milner* of the second part, and *Richard Furber* of the third part, Mrs. *Milner* purported to assign her interest in the estate of *Charles Burslem Saunders*, subject to the incumbrance in favour of *John Robins* to *Richard Furber*, to secure advances made by him with interest at the rate of 7 per cent. per annum.

The parties were under a misapprehension as to the effect of the marriage settlement and confirmation, and previously to the execution of the mortgages the mortgagees were informed by *Edward Milner* and Mrs. *Milner* that there was no settlement or incumbrance affecting Mrs. *Milner's* interest under the will of *Charles Burslem Saunders*.

At the time the mortgages were executed, *Edward Milner* was in embarrassed circumstances, and the money advanced was employed in paying his debts, and in the purchase by Mrs. *Milner* of certain policies on his life which he had assigned to creditors. He occupied an important position as senior surgeon to a *London* special hospital, and had a private practice bringing in an income of more than £2000 a year. Arrangements had been made for the granting of additional policies on the life of *Edward Milner*, to the mortgagees which were with the existing policies, to be held subject to the mortgages for the benefit of Mrs. *Milner*. The mortgagees were willing, if the restraint on anticipation imposed on Mrs. *Milner* were released, that their rate of interest should be reduced to 5 per cent. per annum, and that the income of the settled fund derived from *Charles Burslem Saunders* should be applied first in payment of the premiums on the policies, next towards payment of interest on the mortgage debts. The income of the fund was about £230 a year. The amounts due on the respective mortgages were £2000, and £4892 19*s.* 9*d.*

There was evidence that the health of *Edward Milner* was somewhat precarious, that it was important for his health that he should be relieved from pecuniary anxiety, that his profes-

sional income afforded proper maintenance and education for his family, and that in case of his death the arrangement suggested, if carried out, would leave the trust estate unimpaired, and would relieve Mrs. *Milner* of anxiety, and generally be beneficial to her and her children.

A summons taken out (under the *Conveyancing and Law of Property Act*, 1881) by Mrs. *Milner*, that she might be at liberty to concur with *Edward Milner*, notwithstanding the restraint on anticipation contained in her marriage settlement was dismissed. A motion on her part was now made, by way of appeal from the order made in Chambers dismissing her summons.

Cozens-Hardy, Q.C., and *George Henderson*, for the motion.

ROMER, J.:—

I am not prepared to remove the restraint on anticipation absolutely. The order I make is that until further order the income of Mrs. *Milner's* property, derived from *Charles Burslem Saunders*, be applied first in paying the premiums on the policies mentioned in the evidence, and secondly towards paying the interest on the mortgages, the mortgagees undertaking to reduce their rate of interest to 5 per cent., and not to enforce payment of principal without the leave of the Court. The two mortgagees will have to give formal undertaking to the Court.

Solicitor for Applicant: *R. Furber.*

D. P.

ROMER, J.

1891

Aug. 1.

SMITH *v.* SMITH.

Mortgage—Payment off—Notice—Interest—Mortgage of Reversion.

A mortgage was made of the mortgagor's interest in a fund in Court subject to a prior life interest. The fund was assigned by the mortgage deed to the mortgagee "to have, receive, and take the same," subject to the life interest and to the proviso for redemption. After the time appointed for redemption had expired the tenant for life died, and the trustee of a settlement of the fund made by the mortgagor presented a petition for the application of the fund in payment of the mortgagee, and payment of the residue to the persons entitled thereto. The mortgagee had not demanded payment of the debt, or taken any steps to compel payment:—

Held, that, notwithstanding the nature of the mortgaged property and the form of the mortgage deed, the mortgagee was entitled to six months' interest from the date of the service of the petition on him.

Letts v. *Hutchins* (1) explained.

PETITION for the distribution of a fund in Court in this suit.

The suit was commenced in the Court of Chancery on the 16th of March, 1842, for the execution of the trusts of the will of *William Smith*, who died on the 25th of February, 1840. On the 12th of June, 1851, a decree for the execution of the trusts was made. A sum of £20,000 Consols was transferred into Court in the suit to answer an annuity of £600 which was bequeathed by the testator to his wife for her life. Subject to her life interest the fund was given by the testator to his son, *J. G. Smith*. On the 13th of March, 1861, *J. G. Smith* assigned the £20,000 Consols (subject to his mother's life interest) to *William Froom* by way of mortgage to secure the repayment with interest of £5000 advanced to him by *Froom*. The mortgage contained a power of sale. On the 15th of June, 1861, *J. G. Smith* made a settlement of the £20,000 Consols (subject to his mother's life interest and to the mortgage) for the benefit of his wife and children. On the 30th of October, 1865, the executors of *William Froom* (who was then dead), with the concurrence of *J. G. Smith* and of the trustee of the settlement, assigned the mortgage debt of £5000 and interest to *Harriett Dawkins* and *Emma Dawkins*, as tenants

(1) Law Rep. 13 Eq. 176.

in common. And the sum of £20,000 Consols and the dividends to accrue due thereon were thereby assigned to them (subject to the life interest of the testator's widow therein), "to have, receive, and take" the same unto them as tenants in common, subject to the proviso for redemption and reassignment thereinafter contained.

By this deed of transfer a new power of sale was given to the mortgagees in default of payment of the principal and interest. And it was thereby agreed and declared that the mortgagees should stand and be possessed of the moneys arising from any sales or sale, upon trust, in the first place, to pay the costs, charges, and expenses attending the sale, or in obtaining payment of the mortgage money, and, in the next place, to retain and pay the principal sum of £5000 thereby secured and interest thereon, and upon trust to pay the residue of the moneys unto the mortgagors. On the 29th of April, 1871, the mortgage was transferred by the Misses *Dawkins* to *Alexander Martin*. *J. G. Smith* was a party to the transfer. *J. G. Smith* died on the 25th of July, 1887. *Martin* died on the 26th of April, 1891. The testator's widow died on the 5th of June, 1891.

The petition was presented by the trustee of the settlement of the 15th of June, 1861, and it asked that out of the £20,000 Consols the mortgage debt of £5000 might be paid, and that various other payments might be made, and the residue of the fund transferred to the Petitioner. The only question was, whether the executors of *Martin*, as mortgagees, were entitled to six months' interest in lieu of notice to pay off the mortgage. They had not made any demand for payment of the mortgage debt, or taken any other steps to obtain payment. The petition was served on them.

Oswald, for the Petitioner:—

No doubt the general rule of practice is that, after the time fixed for redemption has expired, a mortgagee is entitled to six months' notice of the intention of the mortgagor to pay him off, or to six months' interest in lieu of notice. But to that rule there are some exceptions. It does not apply to a mortgage of a reversionary interest framed as this deed is. By the terms

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of the deed the mortgagee is "to receive and take" the fund when the reversion falls into possession, and out of it to retain what is due to him on his security. He is, therefore, not entitled to notice or to interest in lieu of notice. The falling in of the reversion depended, not on the act of the mortgagor, but on the happening of an uncertain event. If the fund had not been in Court the mortgagee would have paid himself when the reversion fell into possession. In such a case the ordinary rule does not apply: *Letts* v. *Hutchins* (1); *Fisher* on Mortgage (2). Mr. *Fisher* there says that the rule "seems to be inapplicable where the security is naturally discharged by an event which does not depend upon the will of the debtor, as by the falling in of a policy of insurance, which constitutes the security, for it may be considered as part of the arrangement that the debt, if not sooner discharged, shall be paid upon the happening of that event."

MacSwinney, for the executors of the mortgagee, was not heard.

Ribton; *Bramwell Davis*; and *E. A. Jennings*; for other parties.

ROMER, J.:—

It seems to be a settled rule of practice that, after default has been made by a mortgagor in payment of the principal and interest in accordance with the proviso for redemption contained in the mortgage deed, he must either give the mortgagee six calendar months' notice of his intention to pay off the mortgage, or must pay the mortgagee six months' interest in lieu of notice. This is the well-settled general rule. But no doubt the rule is subject to some exceptions. If the mortgagee has himself demanded payment of the debt, or has taken any steps to compel payment of it, no notice by the mortgagor, and no payment of interest in lieu of notice, is required. I think that in *Letts* v. *Hutchins* the mortgagee had taken steps to compel payment of the debt, and I believe that was the true ground of the judgment, though Vice-Chancellor *Wickens* did not state his reasons. I am not aware of any exception to the rule arising

(1) Law Rep. 13 Eq. 176. (2) 4th Ed. pp. 734, 735.

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out of the nature of the mortgaged property, and I will not be the first Judge to introduce such an exception. I shall adhere to the rule; and, inasmuch as in the present case the mortgagee has not demanded payment of his debt or taken any steps to compel payment, I am of opinion that he is entitled to six months' notice, or interest in lieu of notice. The interest will run from the date of the service of the petition on the mortgagee. If the mortgagee of a reversionary interest were to apply for and obtain payment of his debt when the reversion fell into possession, in such a case it may well be that he would not be entitled to any interest, because it might be said that he had taken steps to compel payment of his debt. But that is not the present case.

Solicitors: *D. Stock; W. W. Palmer; Crawley, Arnold & Co.; S. Day.*

W. L. C.

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[1889 C. 2044.]

Infant's Marriage Settlement—Agreement to settle after-acquired Property—Repudiation five years after attaining Majority—Reasonable Time—Compensation—Trustees' Right of Retainer—Forfeiture Clause—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 2 [*Revised Ed. Statutes, vol. xvii., p.* 255].

By a marriage settlement made in October, 1883, the father of the intended husband covenanted with the trustees to pay to them £1500 a year during the life of the wife and such further period as there should be any issue of the marriage, and the trustees were to pay the £1500 a year to the husband until he should assign or charge the same, "or until some other event should happen whereby the same, if belonging absolutely to him, would become vested in or payable to some other persons or person," and then there was a discretionary trust over. The settlement also contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he then was or should become entitled under any settlement or appointment executed or to be executed by his father, or under the will of his father or mother, or by virtue of the intestacy of either of them. At the time of their marriage both the husband and wife were under age, and the settlement was confirmed by the Court on behalf

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of the wife but not on behalf of the husband, who attained his majority in November, 1883.

The father died in May, 1887, and by his will confirmed certain settlements made by him in his lifetime, under which the husband took an interest, and gave the residue of his real and personal estate to his two sons (one of whom was the husband) in equal shares. The husband received the £1500 a year from the trustees of his settlement during his father's lifetime, and, after his death, until July, 1888, when he repudiated the settlement. On action by the trustees, claiming that the husband was bound by the settlement and could not repudiate it, and, in the alternative, for compensation for the parties disappointed by such repudiation:—

Held, that the settlement was voidable by the husband within a reasonable time after he attained twenty-one, and that, under the circumstances, he had repudiated it within a reasonable time, and was not bound by his not having repudiated it during his father's lifetime.

But *held*, that the husband must repay to the trustees the instalments of the £1500 a year which he had received since his father's death, and that the trustees were entitled to be paid the same out of the property coming to the husband under his father's will in priority to the husband's mortgagees and to his trustee under a deed of arrangement.

Codrington v. *Lindsay* (1) followed on this point.

Held, also, that the trustees were entitled to retain the moneys still payable to the husband under the settlement to make compensation to the persons disappointed by the repudiation, and that such retainer operated as a forfeiture of the husband's life interest in the annuity, and that the discretionary trust over took effect.

McCarogher v. *Whieldon* (2) followed on this point.

In re Vardon's Trusts (3) distinguished.

THIS was an action by the trustees of a marriage settlement against the husband and wife and all other persons interested under the settlement, and against the husband's mortgagees and incumbrancers, and also his trustee in bankruptcy, claiming that the husband was bound by the settlement and could not repudiate it, and, in the alternative, that the husband was bound to make compensation to the persons disappointed under the settlement by his repudiation, under the following circumstances:—

By an indenture of settlement dated the 16th day of October, 1883, and made between *Albert Marcius Silber*, of the first part, the Defendant *M. A. Silber* (stated to be then an infant of the age of twenty years and upwards, and a son of the said *Albert Marcius Silber*), of the second part, the Defendant Lady *Lucy Silber* (then

(1) Law Rep. 8 Ch. 578. (2) Law Rep. 3 Eq. 236.
(3) 31 Ch. D. 275.

Lady *Lucy Vaughan*, spinster, and stated to be an infant of the age of eighteen years), of the third part, and the Plaintiffs *R. B. Carter* and the Earl of *Lisburne*, of the fourth part (being one of the settlements made previously to the marriage then intended, and shortly afterwards solemnised between the Defendants *M. A. Silber* and Lady *Lucy Silber*), the said *Albert Marcius Silber* covenanted with the Plaintiffs that in case the said intended marriage should take place, he, his trustees, executors, and administrators, would pay to the trustees or trustee of the settlement the yearly sum of £1500 during the life of the Defendant Lady *Lucy Silber*, and during such further period (if any) as there should be living any child or grandchild of the said intended marriage, such sum of £1500 to be payable by equal quarterly payments, payable in advance every three months. And it was agreed and declared that the said trustees or trustee should pay the said yearly sum of £1500 as and when the growing payments thereof should be received by them or him to the Defendant *M. A. Silber* during his life, or until he should become a bankrupt or should assign or charge, or affect to assign or charge, the said yearly sum, or some part thereof, or until some other event should happen whereby the said yearly sum, or some part thereof, if belonging absolutely to him, would become vested in or payable to some other persons or person, and in the event of failure or determination during the life of the Defendant *M. A. Silber* of the trust thereinbefore declared in his favour should during the remainder of his life, if the said Lady *Lucy Silber* or any child or grandchild of the said intended marriage should so long live, pay or apply all or any part of the said yearly sum unto, as therein mentioned, or for the personal support or benefit of the Defendant *M. A. Silber* and his wife and issue (if any), and, subject to such discretionary trust or power, should hold the said yearly sum upon the trusts upon which the same would for the time being be held if the Defendant *M. A. Silber* were then dead. And after the death of the Defendant *M. A. Silber* should pay the said yearly sum to the said Lady *Lucy Silber* during her life, for her sole and separate use, and without power to dispose thereof by anticipation. And it was agreed and declared that the interest of the Defendants *M. A. Silber* and Lady *Lucy Silber* respectively

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in the said trust premises should be subject to, and charged with, the obligation of providing out of the said yearly sum a suitable residence and maintenance for the said Lady *Lucy Silber* (as to the life interest of the said *Martin Albert Silber*), and such of the children and grandchildren of the said intended marriage as, being male, should for the time being be under the age of twenty-one years and unmarried, or, being female, should be unmarried in priority (unless the trustees or trustee should otherwise determine) to any other fund applicable for that purpose, but without liability to account so long as the said *M. A. Silber* or Lady *Lucy Silber*, as the case might be, should duly provide such residence and maintenance. And after the death of the Defendants *M. A. Silber* and Lady *Lucy Silber* the said trustees or trustee should stand possessed of the said yearly sum of £1500, or so much thereof as under the provision thereinafter contained should continue payable, upon the trusts and declarations thereinafter declared and contained concerning the moneys assured by a certain policy, being the usual trusts for the benefit of the husband, and the wife, and the issue of the marriage; and it was thereby further agreed and declared that if the Defendant *M. A. Silber* then was, or if he or the trustees or trustee for the time being should become, entitled to any property whatsoever under any settlement executed or to be executed by the said *A. M. Silber*, or under any appointment made or to be made in exercise of any power in any such settlement contained or to be contained, or under or by virtue of the will of the said *A. M. Silber* or the will of *Amelia Silber* his wife, or any codicil thereto respectively, or by virtue of the intestacy of either of them, unless such settlement or appointment or will or codicil should otherwise direct, such property, if not thereby given to the said trustees or trustee, should be vested in them or him upon such trusts for sale or conversion as might be necessary or expedient, and subject thereto upon the trusts thereinbefore declared and contained with respect to the moneys assured by or to become payable under the said policy with certain variations.

The settlement was duly executed by all the said parties thereto, and was approved by the Chancery Division of the High Court of Justice on behalf of Lady *Lucy Silber*, but not on

behalf of the Defendant *M. A. Silber*. The marriage took place, and there were two children born of it, the Defendants *V. E. M. Silber* and *E. E. A. Silber*. The Defendant *M. A. Silber* attained his age of twenty-one years on the 19th of November, 1883.

A. M. Silber, the father, had, previously to this settlement, made three settlements, dated respectively the 2nd of June, 1865, the 31st of December, 1870, and the 22nd of March, 1875, the trusts of which were nearly identical, and to the effect that his wife, the Defendant *Amelia Silber*, should have the income of the funds thereby respectively settled for life, with remainder to such of the settlor's children as he should by will or deed appoint. By his will, dated the 22nd of November, 1878, *A. M. Silber* confirmed the settlements last mentioned, and in exercise of the powers in them contained, he directed that, after the determination of the trusts for his wife, the trust estate should be held upon trust to raise thereout certain sums for his daughters, and on further trust to divide and pay or transfer the residue of the same premises to or between such of his sons as should attain the age of twenty-one years, and, if more than one, in equal shares. And after certain specific and pecuniary bequests, he devised and bequeathed all his real and personal property to his wife the Defendant *Amelia Silber*, and *W. Bell*, and *J. T. Cashell* upon trust for sale and conversion, and upon trust, after payment of his funeral and testamentary expenses, debts, and legacies, and making such other annual and other payments as in his will mentioned, to divide the ultimate residue of the trust premises constituting or representing the residuary estate of the said testator, and the income thereof, between such of the testator's sons as should attain twenty-one, or, if there should be but one such son, the whole to be in trust for him; and the testator appointed the Defendant *Amelia Silber* and *W. Bell* and *J. T. Cashell* executrix and executors of his will.

The testator died on the 14th of May, 1887, and his said will, with a codicil, were duly proved by the Defendant *Amelia Silber* alone. The said *W. Bell* and *J. T. Cashell* subsequently renounced the probate and disclaimed the trusts of the will.

The testator left two sons, the Defendant *M. A. Silber* and *R. Silber*.

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The testator paid the annuity of £1500 during his life, and after his death *Amelia Silber*, as his executrix, continued to pay it until the Defendant *M. A. Silber* repudiated his marriage settlement, as after stated.

In the month of December, 1887, the Defendant *M. A. Silber*, through his solicitors, first raised the question whether he was bound by the settlement of the 16th October, 1883, to settle his after-acquired property, and on the 13th of January, 1888, he was urged by the Plaintiffs to decide at once whether he repudiated such settlement or would confirm it if necessary.

On the 16th of January, 1888, the solicitors of the Defendant *M. A. Silber* wrote to the Plaintiffs that, without in any way admitting that he was bound by the arrangement to settle his after-acquired property, and without prejudice to his right to repudiate the same should he be so advised, he consented to his share under the settlement of the 31st of December, 1870 (which had fallen in and amounted to about £2448), being paid to the Plaintiffs as trustees of the settlement of the 16th of October, 1883.

On the 31st of July, 1888, the Defendant *M. A. Silber*, through his solicitors, gave formal notice that he declined to be bound by the settlement of the 16th of October, 1883, on the ground that he was under age at the time, and the deed was not approved by the Court on his behalf.

Thereupon, in June, 1891, the Plaintiffs commenced this action against *Amelia Silber*, *M. A. Silber*, Lady *Lucy Silber*, the infants *V. E. M. Silber* and *E. E. A. Silber*, and several other persons who claimed to be mortgagees of *M. A. Silber*, in respect of his share and interest in the residuary estate of his father *A. M. Silber*.

The Plaintiffs, by their re-amended statement of claim, after setting out the above facts in detail, alleged as follows:—

"16. The Plaintiffs claim that the said *M. A. Silber* was and is bound by the said settlement of the 16th of October, 1883, and that his attempted repudiation of it was inoperative. The said *M. A. Silber* was from the first aware of the purport and effect of the settlement of the 16th of October, 1883. He took a personal part in the negotiations for it, and it was duly read over to

him before he executed it. He knew that it was the intention of his father that any property to which he might become entitled under any settlement executed by his father, or under any appointment in exercise of any power in any such settlement contained, or under or by virtue of his father's will or any codicil thereto, should be settled upon the trusts of the said settlement so as to diminish *pro tanto* the liability of his father under his covenant in respect of the annuity, and by his silence during his father's life he implied that he would give effect to such intention, and the father confirmed his will by the codicil of the 28th day of June, 1886, and in particular left the share of his residuary estate to the said *M. A. Silber* instead of formally settling it upon the trusts of the settlement, in the belief that such intention would be carried out by the said *M. A. Silber*, and the said *M. A. Silber* is bound by a trust in respect thereof. Further, it was not competent for the said *M. A. Silber* to repudiate the said settlement, except within a reasonable time after he attained the age of twenty-one years, and under the circumstances such reasonable time had at all events elapsed at the time of his father's death. Moreover, it was not competent for him to repudiate the said settlement after his receipt in manner hereinbefore mentioned of the said annuity payable thereunder."

And the Plaintiffs claimed (*inter alia*): (1.) That it might be declared that *M. A. Silber* was bound by the settlement of the 16th of October, 1883, and could not repudiate it. In the alternative, if *M. A. Silber* were entitled to repudiate the said settlement, (2.) That it might be declared that the moneys in respect of the said annuity which had been received by the said *M. A. Silber*, and subsequent moneys which would have been payable to him if he had not repudiated the said settlement, and all other, if any, the interest to which, if he had not repudiated, he would have been entitled under the said settlement, ought to be applied in making compensation to the persons disappointed by such repudiation for the benefits of which they respectively had been or would be deprived by such repudiation, so far as the same should extend, and until such compensation should be fully made. (3.) That it might be declared that the amount of the moneys which had been received by *M. A. Silber* in respect of the

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said annuity were payable to the Plaintiffs out of the property which would have been comprised in the said covenant of the said *M. A. Silber* in the said settlement if he had not repudiated the same, or otherwise that it may be declared that the said moneys were a liability of the said *M. A. Silber*, for which the Plaintiffs were entitled to prove under the scheme of arrangement mentioned in the pleadings, and for consequential directions.

The Defendants *Amelia Silber*, Lady *Lucy Silber*, and the two infants, by their respective amended statements of defence, supported the contention of the Plaintiffs.

The Defendant *M. A. Silber*, by his amended statement of defence, denied the allegations in paragraph 16 of the re-amended statement of claim, and pleaded that he had never done any act to ratify or confirm the settlement, and relied on the *Infants' Relief Act*, 1874, as a bar to the action.

The several defendant incumbrancers, by their respective defences, insisted that *M. A. Silber* was entitled to repudiate, and had repudiated, the settlement within a reasonable time, and set up their mortgages and charges.

Issue was joined, and this was the trial of the action.

The Defendant *M. A. Silber* was examined and cross-examined as to the circumstances under which he executed the settlement, and subsequent thereto down to the time of his repudiation of the same, and his evidence is sufficiently noticed in the arguments and judgment.

Neville, Q.C., and *Maidlow*, for the Plaintiffs:—

M. A. Silber must be assumed to know the provisions of the settlement he executed. The result of the evidence is that the only thing he did not understand was this covenant to settle his after-acquired property; but he acted as go-between in the negotiations between his father and Lord *Lisburne*, and either he did know or he was bound to know of the existence of the covenant. At any rate, he is affected with notice of the contents of the settlement he executed, even if his execution of it may not bind him: *Watts* v. *Cresswell* (1). The settlement was not

(1) 9 Vin. Abr. 415.

void, but only voidable: *Duncan* v. *Dixon* (1), and he has affirmed it by his acts. He allowed his father to live and die believing that the settlement was binding, and to make his will in the belief that his son would perform his covenant, and after his father's death he continued to accept benefits under the settlement. He cannot now repudiate. But if he can, he must compensate the persons disappointed by his repudiation, and we are entitled to a lien on his interest under his father's will to the extent of the benefits he has received under the settlement: *Codrington* v. *Lindsay* (2), and that decision was affirmed by the House of Lords in *Codrington* v. *Codrington* (3).

Chadwyck Healey, Q.C., and *F. Thompson*, for the Defendant *Amelia Silber*, argued to the same effect, and cited *Whittingham* v. *Murdy* (4); *Cornwall* v. *Hawkins* (5); *Burnaby* v. *Equitable Reversionary Interest Society* (6).

Haldane, Q.C., and *Butcher*, for the Defendant *M. A. Silber*:—

There has been no ratification. *M. A. Silber* clearly did not know his rights until after his father's death, and so soon as he knew them he repudiated within a reasonable time. Even if the allegations in paragraph 16 of the claim bind him, the 2nd section of the *Infants' Relief Act*, 1874, applies and prevents ratification: *Coxhead* v. *Mullis* (7); *Ditcham* v. *Worrall* (8). No doubt Mr. Justice *Kekewich* in *Duncan* v. *Dixon* questioned *Coxhead* v. *Mullis*, but the decision in *Duncan* v. *Dixon* turned on sect. 1 of the Act, which does not apply to ratification. Next, if the repudiation was good, *M. A. Silber* can receive the annuity all the same, and there is no ground for putting him to his election. The father's covenant to pay the annuity is not dependent on, or in consideration of, the son's covenant to settle after-acquired property. It is quite independent of it, and that distinguishes the case from *Codrington* v. *Lindsay*, where the entire settlement was interdependent, and the principle of election is discussed. Election may be rebutted by a contrary intention

(1) 44 Ch. D. 211.
(2) Law Rep. 8 Ch. 578.
(3) Ibid. 7 H. L. 854.
(4) 60 L. T. (N.S.) 956.
(5) 41 L. J. (Ch.) 435.
(6) 28 Ch. D. 416.
(7) 3 C. P. D. 439.
(8) 5 C. P. D. 410.

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appearing in the instrument. "Restraint on anticipation" is a contrary intention: *In re Vardon's Trusts* (1). Here there is a particular intention that *M. A. Silber* shall not alienate the annuity. If he has to make compensation out of it, he does in fact alienate, and the discretionary trust over takes effect: *Smith* v. *Lucas* (2); *McCarogher* v. *Whieldon* (3), and he has no fund out of which compensation can be made.

A. J. Chitty, for the Defendant Lady *Lucy Silber*, adopted the arguments of the Plaintiffs, and also cited *Zouch* v. *Parsons* (4); *North Western Railway Company* v. *M'Michael* (5); *Cornwall* v. *Hawkins* (6); *Jones* v. *Badley* (7); *In re Tussaud's Estate* (8).

Method, for the infant Defendants.

Sir *H. Davey*, Q.C., and *Hornell*, for the Defendant *H. A. White*, the first mortgagee of *M. A. Silber's* interests under his father's will:—

M. A. Silber had a perfect right to repudiate the settlement, and he did so within reasonable time, and he is not put to his election: *Codrington* v. *Lindsay* (9); *Wilson* v. *Thornbury* (10). He did not know his rights until after his father's death, and until he knew the value of his share under his father's will, how could he elect?

Horton Smith, Q.C., and *Ingpen*; *Haldane*, Q.C., and *Boome*; *Yate Lee*, *H. Terrell*, *R. Wallace*, and *Waggett*, for other defendant incumbrancers.

Franks, for the Defendant *Hasluck*, the trustee under a deed of arrangement for the benefit of his creditors executed by the Defendant *M. A. Silber*.

Neville, in reply.

(1) 31 Ch. D. 275.
(2) 18 Ch. D. 531.
(3) Law Rep. 3 Eq. 236.
(4) 3 Burr. 1794.
(5) 5 Ex. 114.
(6) 20 W. R. 653.
(7) Law Rep. 3 Ch. 362.
(8) 9 Ch. D. 363, 376.
(9) Law Rep. 8 Ch. 578.
(10) Ibid. 10 Ch. 239.

1891. May 29. ROMER, J:—

In this case there is no dispute as to facts apart from the question as to the actual knowledge of the Defendant *Martin Albert Silber*, during his father's lifetime, of the effect of the settlement, as pleaded in paragraph 16 of the re-amended statement of claim. This question is one distinct from that of the legal effect of his execution of the settlement, which I will consider hereafter. On the evidence before me I am satisfied that the Defendant, the son, was not, in fact, aware, during his father's lifetime, that the settlement purported to bind any property he might acquire under his father's will, and that the allegations in paragraph 16, as to the son being aware of his father's intention, there referred to, and by his silence encouraging his father to make or confirm the disposition by will of his father's property, under the belief that the son would not repudiate his execution of the settlement, are unfounded.

Now, the son having executed the settlement while a minor, and not under the authority of the Court, it is clear, I think, that the settlement was voidable by him, and that he could avoid it in a reasonable time after he attained twenty-one. In the cases where a minor executes a voidable deed the numerous authorities cited before me shew, and I think the true effect of these authorities amounts to this, that what is a reasonable time for the infant to repudiate after he attains twenty-one depends on the circumstances of each case fairly considered.

The first point, therefore, I have to consider is, whether under the circumstances of this case, the son was bound by his not having repudiated the deed during his father's lifetime. I think he was not. During this period he was not called upon by any person to re-execute or to further consider the deed, and I think there was, on his part, no unfair dealing or misleading of his father or of any other party. Moreover, in any case, during this period, whether the deed bound the son or not, it bound the father, and the son was entitled to receive the moneys which were paid to him under the deed. Until the father's death, and it becoming known that the son was entitled under the will to a share in the father's estate, no question actively arose as to the effect of the deed on any property coming to the son, and the

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right of the trustees to withhold payments under the deed to the son, to compensate those injured by the son's refusal to allow his property to be bound by the deed, only first arose on the death of the father. For these reasons I think the son was not bound during his father's lifetime, notwithstanding the receipt during that period of the annuity payable under the deed by the father.

The next point I have to consider is whether the son's formal repudiation on the 31st of July, 1888 (the father having died on the 14th of May, 1887), came too late, bearing in mind that in the meantime the son had received three quarterly instalments of the annuity. I have come to the conclusion that it did not, for I think that the son was entitled to a reasonable time after the father's death to ascertain what his rights were, and what his father's residuary estate would probably amount to, and to be advised before he finally elected, and that the time taken was not, under the circumstances of the case, unreasonable. This, however, must be subject to the son's obligation of repaying the three instalments he received, which, in my judgment, he is bound to do. For reasons already appearing I do not think this obligation extends to the sums he received during the father's lifetime.

The next point which arises is whether the trustees have an equity to be paid these three instalments out of the son's share in the father's residuary estate and other the property which would have been comprised in the covenant of the son in the deed if he had not repudiated the same, in priority to the claims of the son's mortgagees and of his trustee under the scheme of arrangement in bankruptcy. I have come to the conclusion that I cannot treat this question as an open one for me to decide. I consider myself bound by the decision in *Codrington* v. *Lindsay* (1), which cannot be distinguished on this point from the present case. It is true that in the reports of that case I find no mention of any arguments on the point in question. But the point was decided there, and not by consent. In the report of the case (2) I find Lord *Selborne* saying that the equity in question did exist, and minutes of the decree (3) are clear on the point, and were

(1) Law Rep. 8 Ch. 578. (2) Law Rep. 8 Ch. 584.
(3) Law Rep. 8 Ch. 594.

evidently most carefully considered. This decree was appealed from to the House of Lords, and the lords who decided the appeal evidently carefully considered, and in some respects altered, the form of the decree appealed from, and yet did not alter the decree on the point I am now considering. It follows that I must make a declaration in the present case of the existence of the equity in question to the extent I have indicated, and I will only add that I think it is inaccurate to describe this equity as a lien, as has been sometimes done.

I have now further to consider the effect of the repudiation on the moneys which, notwithstanding the repudiation, would still continue to be payable to the son according to the terms of the settlement. I think that those moneys must be retained by the trustees in order to make compensation, and until compensation has been thereby fully made, to the persons disappointed by the repudiation of the benefits under the settlement of which they have been, or will be, deprived by the repudiation. And this gives rise to the further question whether the right of retainer on the part of the trustees does not in itself determine the further payment of the annuity under the deed to the son, seeing that the annuity has thereby "become vested in, or payable to, some other person or persons" within the meaning of those words as used in the deed. I think this further question must be answered in the affirmative, and that consequently the trusts have arisen under the deed with regard to the annuity declared in the event of the failure or determination during the lifetime of the son of the previous trust declared in his favour. For these points there is to guide me the authority of *McCarogher* v. *Whieldon* (1), which was decided in 1867, and has never been questioned until now, and ought, I think, to be treated as binding on me. It is, however, said on behalf of the son that that case has in effect been overruled, and that the case before me is governed by *Vardon's Trusts* (2). But *Vardon's Trusts* appears to me quite distinguishable from the case now before me. In *Vardon's Trusts* the Court of Appeal held that the restraint on anticipation which fettered the settlement of income to the separate use of a married woman altogether prevented, and was intended by the parties to the

(1) Law Rep. 3 Eq. 236. (2) 31 Ch. D. 275.

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settlement altogether to prevent, that income ceasing to be payable to the married woman by any act on her part, including any election by her against the settlement. But in the case before me I can find no indication that the parties to the settlement intended that the annuity should always continue to be payable to the son. On the contrary, they contemplated his assigning or charging it, and provided (*inter alia*) that if he did assign or charge it it should cease to be payable to him. And certainly I cannot gather that it was the intention of the parties to this settlement that the son should be at liberty to repudiate it so far as his obligations were concerned, and still continue to enjoy the annuity. I find here no declaration of a particular intention which is inconsistent with or excludes the doctrine of election.

The above decides all the points which I have been called upon to deal with in this case.

There must accordingly be a declaration to the following effect:—

1. That the son was entitled to repudiate, and has repudiated, the settlement.

2. That the moneys in respect of the said annuity which have been received by the son since the death of the father, and all subsequent moneys which would have been payable to him if he had not repudiated the settlement, and all other, if any, the interest to which, if he had not repudiated, he would have been entitled under the settlement, ought to be applied (subject to the following declaration No. 4) in making compensation to the persons disappointed by such repudiation for the benefits under the settlement of which they respectively have been or will be deprived by such repudiation, so far as the same shall extend, and until such compensation shall be fully made.

3. That in respect of the three instalments received by the son since the father's death, the Plaintiffs, as trustees of the settlement, have the right to be repaid the same out of the share or interest of the son in his father's estate under the father's will and codicil, and that in priority to any claim thereto on the part of the son's incumbrancers or of his trustee, *Laurence Hasluck*, Defendants to this action.

4. That the repudiation and acts of the son have caused a

determination of his interest in the annuity as from the father's death.

As to the costs. The costs of the Plaintiffs and of the Defendants Lady *Lucy Silber* and the infant children must be taxed and raised and paid out of the funds subject to the trusts of the settlement. The Defendant *Amelia Silber* will, of course, get her costs out of her late husband's estate, but I can make no order as to them in this action. The Defendants *Martin Albert Silber* and *Laurence Hasluck* will bear their own costs, but this, of course, will not prejudice the Defendant *L. Hasluck's* right to get his costs out of the funds, subject to the trusts of the scheme of arrangement. I make no order as to the costs of the other Defendants, but, of course, such of them as have charges will be entitled to add their costs to their security.

There should be liberty to apply.

Neville, Q.C., pointed out that Mr. *Silber* had received other instalments since his father's death of the annuity than those actually mentioned in the pleadings.

ROMER, J.:—Those, too, are covered by my judgment, and must be accounted for.

Solicitor for the Plaintiffs: *A. E. Phipps*, agent for *Roberts & Evans, Aberystwith.*

Solicitors for the Defendant *Amelia Silber*: *Simpson & Cullingford.*

Solicitor for the Defendant *M. A. Silber*: *G. R. Grant.*

Solicitors for Lady *Lucy Silber*: *A. & H. White.*

Solicitors for the other Defendants: *H. L. Pemberton; A. & H. White; Hicks & Arnold; G. & W. Webb; G. G. Vertue; G. C. Lea; H. P. Spottiswoode;* and *W. A. Colyer.*

H. L. F.

ROMER, J.
1891
July 7.

In re HEWIT.
LAWSON *v.* DUNCAN.

[1890 H. 2567.]

Scotch Testator—English and Scotch Realty—Annuities—Charitable Legacies—Administration.

A domiciled Scotchman, by his will, devised and bequeathed to trustees all his real and personal estate, and, after directing payment of his debts, testamentary and funeral expenses, and giving various legacies and annuities, directed the residue of his estate to be apportioned amongst certain charities. The testator's personal estate was more than sufficient to satisfy all his debts, testamentary and funeral expenses, and the legacies and annuities; his residuary estate comprised English and Scotch realty.

By the law of *Scotland*, debts, testamentary and funeral expenses, and legacies, are a primary charge on personal estate, and annuities are a primary charge on heritable or real estate.

The testator's heir-at-law claimed the English realty as undisposed of, on the ground that by English law it was not liable to contribute to the charities or annuities. It was conceded that the charitable gifts, so far as they were payable out of the English realty, were void:—

Held, that the Scotch law of administration applied, and that the English realty, rateably with the Scotch realty, must contribute towards the annuities.

D. G. HEWIT, leather-dresser, of *Edinburgh* and *London*, by his trust disposition and settlement, dated the 21st of May, 1887, and drawn in Scotch form, appointed the Plaintiff and the Defendants his trustees and executors, and devised and bequeathed to them all his real and personal estate, whatsoever and wheresoever situated, upon trust (*inter alia*) to pay his debts, funeral and testamentary expenses, and various annuities and pecuniary legacies. And the testator directed his residuary estate to be distributed amongst his children, whose interests were to vest as therein mentioned; and in the event of failure of children (which event happened), the testator directed his trustees to divide and apportion his residuary estate (after paying certain further legacies) amongst several named charitable institutions. And to enable his trustees to carry out the purposes of his said trust disposition the testator empowered them, whenever they might

think fit, to sell and convert into money the whole of his estate or any part thereof by public auction or private contract. And the testator declared that, although at the date of his said trust disposition resident in *England*, he was a domiciled Scotchman, and that he desired his affairs to be administered and wound up as far as practicable in accordance with the law and practice of *Scotland*.

The testator died in August, 1887, being at the time a domiciled Scotchman. All the trustees and executors named in his said trust disposition and settlement accepted the trust thereof, and were duly confirmed in their offices by the Commissary Court of *Scotland*, and that confirmation was duly sealed in the Probate Division of the High Court of Justice in *England*.

The testator died possessed of considerable personal estate, and of Scotch and English real estate of some value. His personal estate was more than sufficient to pay all his debts, testamentary and funeral expenses, and the legacies and annuities bequeathed by his said trust disposition ; and soon after his death the question was raised whether the bequest of his residuary estate to charitable institutions was not void so far as it affected the real estate in *England*, and whether such real estate was not in fact undisposed of, and went to the heir-at-law, according to the law of *England*, who was the Plaintiff.

To determine these and other questions, the Defendants in June, 1888, commenced an action of declarator in the Court of Sessions in *Scotland*, claiming against the Plaintiff (who was called as defender) a declaration that they and the Plaintiff, as trustees of the said trust disposition, were entitled and bound to administer and divide the whole means and estate of the testator, including his real estate situate in *England*, under and in the terms of the said trust disposition. By an interlocutor pronounced in the said action, and dated the 19th of February, 1889, a case was remitted to the High Court of Justice in *England*, under the Act 22 & 23 Vict. c. 63, for its opinion as to whether by English law the gift of residue to charitable institutions would not be void so far as it was payable out of the English real estate, and whether such real estate was not therefore undisposed of; and by an order of the High Court, dated the

ROMER, J. 1891 *In re* HEWIT. LAWSON *v.* DUNCAN.

6th of April, 1889, Mr. Justice *Kay* (amongst other things) declared his opinion to be that the bequests of the testator's residuary trust estate to charitable institutions, so far as they were payable out of his English freehold and leasehold estates, were null and void by virtue of the *Statute of Mortmain*, (9 Geo. 2, c. 36), re-enacted by 51 & 52 Vict. c. 42, and that the person entitled to the English freehold estates, or the proceeds of sale thereof, was the testator's heir-at-law.

In July, 1890, the Defendants proposed to sell the English real estate of the testator, and thereupon the Plaintiff (as the testator's heir-at-law) commenced this action against them, claiming (1.) a declaration that the charitable gifts contained in the said trust disposition and settlement of the testator, so far as the same were payable out of the English real estate, were null and void by virtue of the said *Statute of Mortmain*; (2.) a declaration that upon the true construction of said trust disposition the personal estate of the testator was the primary fund for payment of his funeral and testamentary expenses, debts, legacies, and annuities, and that the Plaintiff, as his heir-at-law, was absolutely entitled to the whole of the English real estate of the testator, freed and discharged from any liability to contribute to the payment of such expenses, debts, legacies or annuities; (3.) an injunction to restrain the sale of the English realty; and (4.) an order for a conveyance to him from the Defendants of the said English real estate. A statement of defence was put in, but the above facts were not disputed. Issue was joined, and this was the trial of the action. The action in the Scotch Court was still pending, no decision having been given on the basis of Mr. Justice *Kay's* opinion.

It was conceded that the gifts to charities, so far as they were payable out of the English real estate, were null and void; and the main contention was whether the English real estate was liable to contribute to the payment and discharge of the annuities.

The Lord Advocate and the Solicitor-General of *Scotland* gave evidence as to the law of *Scotland* with respect to the administration of estates of Scotch testators, from which it appeared that by the law of *Scotland* debts, testamentary and funeral expenses,

and legacies are a primary charge on personal estates, and annuities are a primary charge on heritable or real estate; and that the Scotch Courts, in administering the estate of a Scotch testator, would apply the law of *Scotland* to all the heritable or real estate of the testator, wheresoever situated, except so far as they were prevented by the *lex loci rei sitæ*.

Haldane, Q.C., and *R. Younger*, for the Plaintiff:—

English law governs this devise of English real estate. The charitable gifts are admittedly void, and by English law annuities are a primary charge on personal estate. Here all the debts and legacies have been paid, and after providing out of the personalty for the annuities there will still remain a considerable surplus. The Plaintiff, therefore, is entitled to the English real estate without any liability to contribute to the annuities: *Harrison* v. *Harrison* (1).

Chadwyck Healey, Q.C., *J. G. Wood*, and *Brodie Innes*, for the Defendants, were not called upon.

ROMER, J.:—

The only point I have to consider is, whether or not the Plaintiff can say as against the Defendants that the Defendants have no right, as against him, to call upon the English real estate to provide for annuities under existing circumstances; but he has not satisfied me on that at all. In the first place, I think the experts who were called on his behalf not only do not prove his case, but, in my judgment, they disprove it. It is clear that under this will, so far as it concerns the Scotch realty, the duty of the Defendants is to see that it is retained by them, and, if necessary, sold, in order to primarily answer the annuities given by the will. It is also clear that the will operates upon the English realty, and that, except in so far as the English law steps in and prevents the will operating, the will operates to pass the real estate to the Defendants and to cast the same obligations upon them with regard to the English realty as they have in respect of the Scotch realty. It is true that with regard to the

(1) Law Rep. 8 Ch. 342.

ROMER, J. 1891 *In re* HEWIT. LAWSON *v.* DUNCAN.

English realty the Defendants, by the obligations of English law, must not deal with any of the proceeds of the sale of that realty in paying the charitable legacies, or any portion of them, but they must pay such portion as would go in paying the charitable legacies to the English heir. But except so far, the will operates upon the English realty in England as it operates upon the Scotch realty. It is vested in the Defendants, and it appears to me that the Defendants, according to the true construction of the will, may still be obliged to have recourse to the English realty as well as the Scotch realty, at any rate for the purpose of providing for the annuities given by the will, and possibly also for other purposes; but I cannot conceive that, according to the true construction of this will, it was intended that the English realty should be dealt with in any way differently from the Scotch realty, except in so far as the English law interfered so as to prevent the English realty being dealt with in the same manner as the Scotch. Not only do I come to that conclusion from looking at the will itself, but I am also corroborated in that view by the evidence of the experts who satisfied me that according to Scotch law the same rule would have prevailed. Holding as I do the view that the Defendants are not now obliged to hold the English realty merely as trustees for the Plaintiff, but that they may be obliged to have recourse to that real estate for some of the purposes of the will, I cannot hold that they are bound to convey that real estate to the Plaintiff, or that the Plaintiff is entitled to an injunction against them to restrain them from selling it. The Plaintiff is entitled to the first declaration that he asks—indeed, that never was in contest—and that declaration he may take if he so desires; but otherwise I do not think that I ought to make any declaration or order in this action. The costs of this action must come out of the English real estate.

Solicitors for Plaintiff: *Neish & Howell.*
Solicitors for Defendants: *Faithfull & Owen.*

H. L. F.

END OF VOL. III.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1891, will be as follows:—

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[1891] 1 Ch. [1891] 2 Ch. [1891] 3 Ch.

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ACCUMULATIONS—*Will — Income — Rebuilding and Repair of Buildings—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98).] A testator who was possessed (inter alia) of numerous freehold and leasehold messuages, and who died in 1870, by his will, after giving legacies and annuities to be paid out of the rents of his real and leasehold estate and the income of his general trust fund, bequeathed his pure personal estate upon trust for sale and conversion and payment of debts and legacies, and directed his trustees to invest the clear surplus to form the nucleus of a general trust fund. He then gave his real and leasehold estates upon certain trusts during the lifetime of the annuitants and the survivor of them, and directed the net rents and income of his real and leasehold estate and general trust fund to be applied (inter alia) in paying the ground rents of the leaseholds, and in keeping the freehold and leasehold messuages insured against fire and in tenantable repair, and in paying the annuities, and the clear surplus to be invested in augmentation of the general trust fund, declaring that any insufficiency in the insurance moneys received upon the destruction by fire of any building and the cost of rebuilding and substantially repairing any building should be made good out of the general trust fund. And he directed his trustees, after the death of the survivor of the annuitants, to sell his real and leasehold estate and hold the proceeds and the general trust fund upon trust for certain persons as tenants in common. Twenty-one years after the testator's death, some of the annuitants were still living, several of the terms of years, for which the leasehold messuages were held, were still running, and the covenants in some of the leases had not been completely performed:—*Held*, (1) that the will amounted to an express direction for the accumulation of income; and, (2) that upon the principle of *Vine* v. *Raleigh* ([1891] 2 Ch. 13) the trust for accumulation was valid, so far as it was a bonâ fide provision for the performance of the trusts for rebuilding, repairing, and reinstating the buildings; but that, subject to the due performance of such trusts, the trust for investment of the surplus income, after answering the purposes specified in the will, was invalid as from the expiration of twenty-one years from the testator's death. *In re* MASON. MASON *v.* MASON - - 467

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ADMINISTRATION—*continued.*

well of the proceeds of sale of the residuary real estate as of the residuary personal estate, any sums due by them to the testator at the date of his death, with interest at 4 per cent. from that date. By the will freehold and leasehold hereditaments were given specifically to the three sons:—*Held*, that they were respectively entitled to the properties specifically given without first making good what (if anything) they owed to the testator's estate. *In re* AKERMAN. AKERMAN *v.* AKERMAN - - - - - 212

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BUILDING LEASE—*continued.*
had been parties to it; (2) that A. was entitled to an unobstructed access of light to his houses, subject only (if at all) to restriction from buildings to be erected on other parts of the land; and (3) that the hoarding was not a building, and must be removed. *Myers* v. *Catterson* (43 Ch. D. 470) followed. WILSON *v.* QUEEN'S CLUB 522

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—— *Mountjoy's (Lord) Case* (Godb. 17; 1 Anderson, 307) considered - - 502
See MINE.

—— *Myers* v. *Catterson* (43 Ch. D. 470) followed
See BUILDING LEASE. [522

—— *Ogle* v. *Story* (4 B. & Ad. 735) distinguished
See SOLICITOR. 2. [145

—— *Reade* v. *Bentley* (3 K. & J. 271) followed
See COPYRIGHT. 2. [291

—— *Selwyn* v. *Brown* (3 Bro. P. C. 607) distinguished - - - - 422
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—— *Shepherdson* v. *Dale* (12 Jur. (N.S.) 156) disapproved - - - 53
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—— *Slim* v. *Croucher* (1 D. F. & J. 518) overruled - - - - 82
See TRUSTEE. 2.

—— *Standard Manufacturing Company, In re* ([1891] 1 Ch. 627, 640) followed 260
See COMPANY. 6.

—— *Strong* v. *Bird* (Law Rep. 18 Eq. 315) followed - - - - 422
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—— *Teasdale's Case* (Law Rep. 9 Ch. 54) followed - - - - 459
See COMPANY. 4.

—— *Trevor* v. *Whitworth* (12 App. Cas. 409) considered - - - - 459
See COMPANY. 4.

—— *Vardon's Trusts, In re* (31 Ch. D. 275) distinguished - - - - 553
See INFANT. 2.

—— *Vine* v. *Raleigh* ([1891] 2 Ch. 13) followed
See ACCUMULATIONS. [467

—— *Watson* v. *Young* (28 Ch. D. 436) questioned
See WILL. 8. [242

—— *Wekett* v. *Raby* (2 Bro. P. C. 386) followed
See WILL. 1. [422

—— *Wenlock (Baroness)* v. *River Dee Company* (36 Ch. D. 675, n.) distinguished 432
See COMPANY. 2.

—— *White* v. *Chitty* (Law Rep. 1 Eq. 372) distinguished - - - - 1
See WILL. 3.

CHARITY — *Application for a Scheme—Withdrawal of Application—Jurisdiction of Commissioners—Charitable Trusts Act*, 1860 (23 & 24 *Vict. c.* 136), *ss.* 2, 4, 6, 8.] Where a formal application for a scheme, pursuant to the Charitable Trusts Act, 1860, has once been made, the jurisdiction of the Commissioners attaches absolutely to the charity, and cannot be stopped or put an end to by a withdrawal of the application before the scheme has been completed and sealed. *In re* POOR'S LANDS CHARITY, BETHNAL GREEN 400

2. —— *Will—Legacy — Condition — Tomb—Family Vault—Repairs—Gift Over to another Charity—Perpetuities.*] A testator gave a fund to the trustees of charity A., and committed the keys to his family vault in H. cemetery to their care and charge, "the same to be kept in good repair, and name legible, and to rebuild when it shall require: failing to comply with this request, the money to go to" charity B.:—*Held* (affirming Stirling, J.), that the condition for the repair, &c., of the family vault was valid, and binding on charity A., and that the gift over, on failure to comply with the condition, to charity B. was good, on the principle that the rule against perpetuities has no application to a transfer, in a certain event, of property from one charity to another: *Christ's Hospital* v. *Grainger* (1 Mac. & G. 460). *In re* TYLER. TYLER *v* TYLER C. A. 252

—— Legacy—Scotch testator—English realty
See ADMINISTRATION. 3. [568

CLASS—Gift to—Period of ascertaining - 197
See WILL. 5.

COMMISSIONERS—Charity—Jurisdiction of
See CHARITY. 1. [400

COMPANY—*Alteration of Memorandum of Association—Confirmation by Court—Condition imposed—Change of Company's Name—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.] On confirming an alteration in the memorandum of association of a company, the effect of which was to enlarge the area of the company's operations, the Court imposed the condition that the name of the company, which indicated that its operations were limited to one country, must be altered so as no longer to contain such a suggestion. *In re* INDIAN MECHANICAL GOLD EXTRACTING COMPANY - - 538

2. —— *Borrowing Powers—Trading Company—Implied Power of Borrowing.*] A company established under the Companies Act, 1862, for the purpose of the sale and purchase of estates and property, the granting of advances on property intended for sale, and loans on deposit of securities, and the discounting of approved commercial bills, had under its memorandum and articles of association no express power to borrow money. The company received deposits and discounted bills; and one of its directors, who was also a depositor, advanced money to the company upon the security of an equitable charge on realty belonging to the company, in order to enable it to repay money due to himself and another depositor. The company was afterwards ordered to be wound up, and, in an action by the liquidator to set aside the security as ultrà vires the company, it was *Held* (1), that the company was a trading company, and as such had an implied power to borrow money for the purposes of its business; and (2), that the borrowing which had taken place was one properly incident to the course and conduct of the business of the company for its proper purposes; and, accordingly, that as the deposits were valid loans, it was competent for the company to borrow money for the purpose of repaying the depositors, and to give security to the person who made the advance, in the manner they had done. The propositions of law as to the implied power of borrowing possessed by trading companies laid down in *Australian Auxiliary Steam Clipper Company* v. *Mounsey* (4 K. & J. 733) and *Bryon* v. *Metropolitan Saloon Omnibus Company* (3 De G. & J. 123), are not affected by the decision in *Blackburn Benefit Building Society* v. *Cunliffe Brooks & Co.* (22 Ch. D. 61), or the judgment of Lord Esher, M.R., in *Baroness Wenlock* v. *River Dee Company* (36 Ch. D. 675, n.). GENERAL AUCTION ESTATE AND MONETARY COMPANY *v.* SMITH - - 432

3. —— *Director—Qualification Shares—Contributory.*] On the 22nd of October, 1888, Lord I. was appointed an original director of a company whose articles provided that each director should hold, at least, forty shares in the company. At a meeting of some of the directors, held on the 25th of October, 1888, forty shares were, without his knowledge, allotted to him, and before he ever acted as a director his name was placed on the

COMPANY—*continued.*

register in respect of those forty shares. He had never applied for these shares, and, according to his evidence, he never knew until after the company was ordered to be wound up that these shares had been allotted to him or registered in his name. He first acted as a director on the 28th of November, 1888, and he next so acted on the 16th and 18th of January, 1889. On the 19th of January, 1889, he acquired by transfer forty fully paid shares in the company which were duly registered in his name, and on the 28th of January he retired from the board. The company was afterwards ordered to be wound up, and upon an application to remove Lord I.'s name from the list of contributories in respect of the forty shares allotted to him on the 25th of October, 1888, it was held by North, J., that his name was properly on the register in respect of them, at any rate from the time when he first acted:—*Held*, by the Court of Appeal (affirming the judgment of North, J.), (1) that Lord I. must be taken to have known that it was his duty to qualify for the office of director by taking forty shares within a reasonable time, and (2) that a reasonable time had elapsed, if not by the 24th of November, 1888, at all events, before the 19th of January, 1889. *In re* Portuguese Consolidated Copper Mines, Limited. *Ex parte* Lord Inchiquin - **C. A. 28**

4. —— *Increase of Capital — Surrender of Shares—Issue of New Shares in Exchange—Power of Company to pass Special Resolutions—Preference Shares.*] Although the dictum of James, L.J., in *Teasdale's Case* (Law Rep. 9 Ch. 54), that a company "may give itself power to purchase its own shares," was treated by the House of Lords in *Trevor* v. *Whitworth* (12 App. Cas. 409) as going beyond the law, the decision in *Teasdale's Case* was not overruled or impeached by the decision in *Trevor* v. *Whitworth*. By the memorandum and articles of association of a limited company the company was empowered to increase its capital by the creation of new shares, which might be issued with such preferential rights as to payment of dividends or repayment of capital, and generally on such terms as the company should by special resolution determine; and it was provided that, subject to any special resolution to the contrary, all new shares were to be offered to such members of the company as were entitled to receive notices from the company, in proportion to the existing shares held by them; and the directors of the company were empowered to accept surrenders of shares from any member of the company upon such terms as should be agreed upon:—*Held*, following the decision in *Teasdale's Case*, that special resolutions authorizing the increase of the company's capital by the issue of new shares with preferential rights as to payment of dividends and repayment of capital, and empowering the directors to allot such new shares as fully paid up to any holder of ordinary shares in consideration of the surrender of an equivalent amount of fully paid-up ordinary shares, were not ultrà vires the company, provided the surrenders were made bonâ fide, and not for the purpose of enabling any shareholders to escape liability. Eichbaum *v.* City of Chicago Grain Elevators, Limited - - - - - **459**

COMPANY—*continued.*

5. —— *Winding-up — Contributory — Calls—Balance Order — "Final Judgment" — Right of Action—Original Debt—Specialty Debt—Merger of Old Remedy in New—Jurisdiction—Companies Act*, 1862, *ss.* 75, 101, 102, 120.] *Held*, by Kekewich, J., following *Chalk, Webb & Co.* v. *Tennent* (36 W. R. 263; 57 L. T. (N.S.) 598), that an action to enforce a balance order made under sect. 101 or sect. 102 of the Companies Act, 1862, for calls made before or in the winding-up of a limited company, cannot be maintained. But, *held*, by Kekewich, J., and by the Court of Appeal, that where calls have been made before the winding-up, and, after the winding-up the company brings an action, on a writ specially indorsed, for payment of those calls, that action may be maintained notwithstanding that a balance order has been made in the winding-up for the amount of the calls; the right of action in respect of the calls as an original debt not being merged in or destroyed by the balance order. A balance order under the Companies Act, 1862, is not a "judgment." The nature of a balance order discussed. Westmoreland Green and Blue Slate Company *v.* Feilden - - - **C. A. 15**

6. —— *Winding-up — Debenture-holders — Floating Security—Execution Creditor—Sheriff—Priority.*] The sheriff, on seizing, on behalf of an execution creditor, goods belonging to a limited company, takes—at all events before sale by him—subject to the rights of debenture-holders under debentures charging all the property of the company as security for the debenture debt: *In re Standard Manufacturing Company* ([1891] 1 Ch. 627, 640–1). But whether, after sale by the sheriff, the debenture-holders lose their priority, *quære*. At the time of the presentation of a petition for winding up a limited company, the sheriff was in possession of goods of the company which he had seized under writs of fi. fa. These goods were covered by debentures charging all the company's undertaking and property as a floating security for the debenture debt. Subsequently to the presentation of the petition the sheriff gave up possession of the goods, and, a winding-up order having been made, they were sold by the official liquidator, who retained the proceeds. Upon a summons by the sheriff against the liquidator and the debenture-holders, to have the judgment debts and costs paid out of the proceeds of sale:—*Held* (reversing Kekewich, J.), that the sheriff was not entitled to be paid in priority to the debenture-holders, and the summons was accordingly dismissed with costs, but without prejudice to any application by the sheriff for payment of his claim out of any money in the hands of the liquidator not subject to or charged by the debentures. *In re* Opera, Limited - **C. A. 260**

7. —— *Winding-up—Voluntary Winding-up—Right of Creditor to Compulsory Order—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 145—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 8, 9.] Notwithstanding the powers conferred upon the Court by the Companies (Winding-up) Act, 1890, a creditor is not entitled to an order for the compulsory winding-up of a company which has resolved to wind up voluntarily, unless he can shew, as provided by

COMPANY—*continued.*
sect. 145 of the Companies Act, 1862, that his rights will be prejudiced by the voluntary winding-up. *In re* Russell, Cordner & Co. - 171

COMPENSATION—Copyholds taken by railway company - - - - 443
See Lands Clauses Act. 1.

—— Right of way—Latent defect - 405
See Vendor and Purchaser. 2.

—— Statutory—Failure to obtain - - 222
See Damages.

CONDITIONS OF SALE—Compensation—Latent defect - - - - 405
See Vendor and Purchaser. 2.

CONFLICT OF LAWS—Scotch testator—English and Scotch realty - - - 568
See Administration. 3.

CONTEMPT OF COURT—Marriage of ward of Court after attaining twenty-one 270
See Infant. 3.

—— Motion to commit—Service - - 488
See Practice. 4.

CONTINGENT REMAINDER — 40 & 41 *Vict. c.* 33—*Equitable Estate—Intestacy.*] An equitable contingent remainder created before the Act 40 & 41 Vict. c. 33, which becomes clothed with the legal estate after the passing of the Act, is not defeated by the failure of the prior life interest; nor would it have been defeated by becoming clothed with the legal estate if the Act had not been passed. *In re* Freme. Freme *v.* Logan [167

—— Executory devise—Gift to issue of tenant-for-life at twenty-one - - 150
See Will. 6

CONTRACT—*To make an Article on Premises of Purchaser—Sub-contract—Property in incomplete Article—Lien for Purchase-money.*] A. contracted with the B. Company to erect two specified tanks on C.'s premises, to be paid for after completion. The B. Company contracted with C. to erect the tanks specified, to be paid for after completion. When A. had partly constructed the tanks, a receiver of the property of the B. Company was appointed in a debenture-holder's action. The B. Company were insolvent. The tanks were not fixed to the soil, but were too heavy to move:—*Held*, that the property in the incomplete tanks was in A., and that he had a lien on the purchase-money that would be payable by C. for his purchase-money. Bellamy *v.* Davey - 540

—— Sale of land—Statute of Frauds - 77
See Vendor and Purchaser. 1.

CONTRIBUTORY—Winding up - 15, 28
See Company. 3, 5.

COPYHOLD—Taken by railway company—Compensation - - - - 443
See Lands Clauses Act. 1.

COPYRIGHT — *Practice — Design — Defendant's Particulars of Objections — Amendment — Costs.*] The rule of practice in a patent action that a Defendant will be allowed to amend his particulars of objections on terms that the Plaintiff may elect to discontinue his action, and the Defendant bear the costs subsequent to the delivery of his first particulars, is applicable to actions to restrain infringement of copyright in registered designs. Morris Wilson and Co. *v.* Coventry Machinists Company - - - 418

2. —— *Pictures — Infringement — License to Copy—Subsequent Assignment*—25 & 26 *Vict. c.* 68, *ss.* 3, 4, 6.] *Held*, by Vaughan Williams, J., on the authority of *Heap* v. *Hartley* (42 Ch. D. 461) and *Reade* v. *Bentley* (3 K. & J. 271), that where the painter of a picture, after giving a license to A. to publish it in monochrome, assigns the entire copyright to B. without notice of the license, and then A., without notice of the assignment, publishes in monochrome, B. can sue A. for infringement. K. & Co., art colour printers, who were owners of a picture called "The Bride," and the copyright in it, entered into an agreement with the A. Company, the terms of which were embodied in a letter of the 19th of April, 1890, from K. & Co., "For 55,000 copies of 'The Bride' [style of reproduction described], price £13 9*s.* per 1000 copies, which price includes sole and entire copyright nett. 5000 copies not later than September, 1890; balance, 50,000, not later than November 15, 1890. Picture and frame to become your property for an extra sum of £17, we to insure and take all risks of picture during time of progress of work. Terms of payment, bills at five, six, and seven months from date of delivery of goods." On the 20th of May, 1890, K. & Co. registered themselves as owners of the copyright. After this the A. Company and K. & Co. commenced an action against an infringer, and Vaughan Williams, J., gave a judgment giving penalties to the Plaintiffs. The Defendant appealed:—*Held*, by Fry and Lopes, L.JJ., that the title to the copyright passed immediately by the letter of the 19th of April, 1890; that K. & Co., therefore, were not owners of the copyright at the time of the registration, and did not by registration acquire a title to sue; that the A. Company not being registered could not sue, and that the action must therefore be dismissed. *Held*, by Lindley, L.J., that the negotiations ended by the letter of the 19th of April amounted to an agreement by K. & Co. to sell the copyright to the A. Company, but did not amount to an assignment of it; and that K. & Co. being the registered proprietors could sue as trustees for the A. Company, and that the action could be maintained. London Printing and Publishing Alliance, Limited *v.* Cox - - C. A. 291

—— Infringement—"Full costs" - - 115
See Practice. 1.

COSTS—"Full costs" - - - 115
See Practice. 1.

—— Settled Land Act — Unsuccessful sale — Charge on land - - - 65
See Settled Land Act.

COVENANT—To settle - - - 176
See Settlement. 1.

—— To settle—Infant's settlement - 48
See Infant. 1.

CREDITOR—Company — Right to winding-up order - - - - - 171
See Company. 7.

CUSTOM OF COUNTRY—Cutting timber—Beech woods - - - - - 306
See TENANT FOR LIFE.

DAMAGES—*Statutory right to commit Damage—Compensation—Failure of Special Statutory Tribunal—Jurisdiction to assess Compensation in an Action.*] Where a right is given by statute to do acts causing damage to other persons' property, subject to the payment to such persons of compensation, and the statute provides a special tribunal for assessing the amount of compensation, if such tribunal becomes non-existent, a person whose property has been damaged by the exercise of the statutory right is entitled to have the amount of compensation assessed in the High Court of Justice. By an Act, 12 Geo. 1, c. 38, the predecessors in title of the Defendants were empowered, as undertakers of the river D. navigation, to clear, scour, and deepen the river, and to lay dredgings taken from it on the banks or lands adjacent to the places where the same should be taken out, giving satisfaction to the owners of such lands for any damage thereby occasioned. The Act appointed a number of persons, therein named, as commissioners for settling, determining and adjusting in manner thereafter mentioned all matters of difference between the undertakers and their successors and the owners of adjacent lands, and provided that such commissioners should have power to determine what satisfaction such landowners should have for the damage done to their lands by the exercise of the statutory powers given to the undertakers. The Act empowered any fifteen or more commissioners assembled together to elect new commissioners in the places of any commissioners who should be dead or refuse to act. All the original commissioners were dead, and no commissioners appointed in their places (if any) were in existence:—*Held*, that a landowner whose land had been damaged by the exercise by the Defendants of the statutory power to lay on his land things taken from the river, was entitled to have the amount of compensation for such damage assessed in an action. BENTLEY *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY - - - - - - 222

DEBENTURE HOLDER—Rights of against execution creditors - - - - 260
See COMPANY. 6.

DEBENTURE STOCK—Bequest of "shares" 135
See WILL. 9.

DEBT—Owing from legatees—Statute of Limitations - - - - - - 212
See ADMINISTRATION. 2.

DELIVERY ORDER—Bills of Sale Act - 206
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DEPOSITED PLANS—Railway company - 278
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DIRECTOR—Qualification - - - - 28
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DRAINAGE - - - - - 183, 527
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ELDEST SON—Settlement—Construction - 394
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ELEGIT—Writ of—Rural sanitary authority 183
See LOCAL GOVERNMENT ACTS. 1.

ENFRANCHISEMENT—Copyholds taken by railway company - - - - 443
See LANDS CLAUSES ACT. 1.

ENJOYMENT IN SPECIE—Tenant for life and remainderman - - - - 482
See WILL. 10.

EQUITABLE ESTATE—Contingent remainder
See CONTINGENT REMAINDER. [167

EQUITY OF REDEMPTION—Reservation of new estate - - - - - 474
See POWER.

ESTOPPEL—Statement operating as - 82
See TRUSTEE. 2.

EVIDENCE—Admissibility—Intention of testator
See WILL. 1. [422

EXAMINATION—Alleged lunatic - - 274
See LUNATIC.

EXECUTION—Rural sanitary authority - 183
See LOCAL GOVERNMENT ACTS. 1.

EXECUTOR—Debtor to testator—Release of debt
See WILL. 1. [422

EXECUTORY DEVISE—Gift to issue of tenant for life at twenty-one - - 150
See WILL. 6.

FALSE REPRESENTATION—Trustee—Liability—Estoppel - - - - 82
See TRUSTEE. 2.

FORFEITURE CLAUSE—Bankruptcy—Annulment - - - - - 1
See WILL. 3.

—— Covenant to settle after-acquired property
See SETTLEMENT. 1. [176

FRAUDS, STATUTE OF—Sale of land—Name of vendor - - - - - 77
See VENDOR AND PURCHASER. 1.

GENERAL ORDER UNDER SOLICITORS REMUNERATION ACT, Sched. I., Part I., 2, 11 - - - - - - 8
See SOLICITOR. 1.

HUSBAND AND WIFE—*Restraint on Anticipation—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.] Restraint on anticipation of property settled on a married woman for life, with remainder to her husband for life, was, under the circumstances, removed till further order, to the extent of allowing the income to be applied in payment of premiums on policies on the husband's life, and towards keeping down interest on mortgages in which she had purported to join with her husband, on the mortgagees undertaking to reduce the rate of interest, and not to enforce payment of the principal without leave of the Court. *In re* MILNER'S SETTLEMENT - - - - - - - 547

INCREASE OF CAPITAL—Issue of new shares in exchange for old ones - - 459
See COMPANY. 4.

INFANT—*Settlement—Covenant to settle after-acquired Property—Property "in Expectancy"*—18 & 19 *Vict. c.* 43, *s.* 1.] By virtue of sect. 1 of the Infants' Settlement Act of 1855, an infant is enabled, with the sanction of the Court, to enter into a covenant to settle after-acquired property, and such a covenant will apply to, and bring within the settlement, an interest acquired by the settlor under the will of a person who dies after the execution of the settlement, such an interest being property "in expectancy" within the meaning of sect. 1. *In re* JOHNSON. MOORE *v.* JOHNSON - - - - - 48

2. —— *Settlement—Covenant to settle after-acquired Property—Repudiation five years after attaining Majority—Reasonable Time—Compensation—Trustees' Right of Retainer—Forfeiture Clause—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 2.] By a marriage settlement made in October, 1883, the father of the intended husband covenanted with the trustees to pay to them £1500 a year during the life of the wife and such further period as there should be any issue of the marriage, and the trustees were to pay the £1500 a year to the husband until he should assign or charge the same, "or until some other event should happen whereby the same, if belonging absolutely to him, would become vested in or payable to some other persons or person," and then there was a discretionary trust over. The settlement also contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he then was or should become entitled under any settlement or appointment executed or to be executed by his father, or under the will of his father or mother, or by virtue of the intestacy of either of them. At the time of their marriage both the husband and wife were under age, and the settlement was confirmed by the Court on behalf of the wife but not on behalf of the husband, who attained his majority in November, 1883. The father died in May, 1887, and by his will confirmed certain settlements made by him in his lifetime, under which the husband took an interest, and gave the residue of his real and personal estate to his two sons (one of whom was the husband) in equal shares. The husband received the £1500 a year from the trustees of his settlement during his father's lifetime, and, after his death, until July, 1888, when he repudiated the settlement. On action by the trustees, claiming that the husband was bound by the settlement and could not repudiate it, and, in the alternative, for compensation for the parties disappointed by such repudiation:—*Held*, that the settlement was voidable by the husband within a reasonable time after he attained twenty-one, and that, under the circumstances, he had repudiated it within a reasonable time, and was not bound by his not having repudiated it during his father's lifetime. But *held*, that the husband must repay to the trustees the instalments of the £1500 a year which he had received since his father's death, and that the trustees were entitled to be paid the same out of the property coming to the husband under his father's will in priority to the husband's mortgagees and to his trustee under a deed of arrangement. *Codrington* v. *Lindsay* (Law Rep. 8 Ch. 578) followed on this point.—*Held*, also, that the trustees were entitled to retain the moneys still

INFANT—*continued.*

payable to the husband under the settlement to make compensation to the persons disappointed by the repudiation, and that such retainer operated as a forfeiture of the husband's life interest in the annuity, and that the discretionary trust over took effect. *McCarogher* v. *Whieldon* (Law Rep. 3 Eq. 236) followed on this point. *In re Vardon's Trusts* (31 Ch. D. 275) distinguished. CARTER *v.* SILBER. CARTER *v.* HASLUCK - 553

3. —— *Ward of Court—Marriage after attaining Twenty-one—Settlement—Contempt—Jurisdiction.*] A gentleman obtained leave of the Court to pay his addresses to a ward of Court on an undertaking that he would abide by the directions and orders of the Court. No directions were given or applied for; but after the lady came of age she made a settlement of her property, giving a joint power of appointment to husband and wife in priority to the other trusts, and the marriage was arranged to take place without the consent of the Court:—*Held*, that the gentleman would not be committing a contempt in marrying the lady, and that the Court had no jurisdiction to restrain the parties from marrying, or the lady from disposing of her property as she pleased. BOLTON *v.* BOLTON - C. A. 270

—— Ward of Court—Enforcement of order 126
See PRACTICE. 5.

INVESTMENT—Discretionary power in trustees
See WILL. 10. [482

—— Trust funds—Power to vary investments
See TRUSTEE. 1. [494

JOINT TENANT—*Severance.*] In order to amount to a severance of a joint tenancy, the act of a joint tenant must be such as to preclude him from claiming by survivorship any interest in the subject-matter of the joint tenancy. A fund had been carried over in an administration action to the credit of the three infant Plaintiffs "as joint tenants." On the 19th of March, 1890, W., the eldest of the Plaintiffs, attained twenty-one, and became entitled to have one-third of the fund in Court paid out to him. On the 20th of March, solicitors were instructed on behalf of W. to take proceedings to get his share paid out, and on the 21st of March they obtained leave to add to a pending summons an application for payment out to W. of his one-third share. The amended summons was returnable on the 28th of March. On that day the parties attended, and the evidence on the part of W. was complete, but owing to pressure of business the summons was not reached, and it was adjourned to the 22nd of April. On the 2nd of April W. died:—*Held*, that nothing had been done by or on behalf of W. which amounted to a severance of the joint tenancy.—*Semble*, it would have been otherwise if an order had been made. *In re* WILKS. CHILD *v.* BULMER [59

—— Tenant in common—Will - - 53
See WILL. 4.

LAKE—Ornamental—Fouling of—Waste 306
See TENANT FOR LIFE.

LANDS CLAUSES ACT — *Railway Company — Copyhold Land taken for Undertaking—Enfran-*

LANDS CLAUSES ACT—*continued.*

chisement—Compensation—Basis of Assessment—Lands Clauses Consolidation Act, 1845, *ss.* 95, 96, 97.] In 1873 a railway company took possession of copyhold lands for the purpose of their undertaking, and erected cottages and works thereon. In November, 1875, the conveyance of the lands was executed and enrolled on the Court Rolls of the manor. No steps towards enfranchisement having been taken by the company, the lord of the manor, in 1886, required the company to enfranchise and pay him compensation. By the custom of the manor an arbitrary fine of two years' improved value was payable on the deaths of either lord or tenant, and of three years' improved value on alienation. It was referred to an arbitrator to settle the amount of compensation to be paid to the lord, and the arbitrator assessed the compensation upon the improved value of the land which had arisen by reason of the works executed by the company:—*Held*, that as the fines which would be lost to the lord by the enfranchisement would have been assessed upon the improved value of the lands, the arbitrator had rightly assessed the compensation upon such improved value. LOWTHER *v.* CALEDONIAN RAILWAY COMPANY - - - - - 443

2. —— *Railway Company—Deposited Plans—"Delineated"—Land not inclosed on every side by Lines.*] The Plaintiffs were tenants of a nursery ground, through the S.W. part of which ran the central line of an intended railway, as shewn on the deposited plans. Only the S.W. boundary and part of the S.E. boundary of the nursery ground were delineated on the plans, the latter being carried to a point a little to the N.E. of the N.E. limit of deviation, and the paths in the ground were carefully delineated and carried on to short unequal distances beyond the same limit. The company gave the Plaintiffs notice to treat for a strip of land bounded on the N.E. by an imaginary line beyond, and distant about a chain and a half from, the N.E. limit of deviation. If this line had been traced on the plan, the tracings of the outer boundary of the nursery ground, and those of nearly all the paths, would have stopped short of it. The Plaintiffs applied for an injunction to restrain the company from taking any ground to the N.E. of the N.E. limit of deviation, as not being delineated on the plans:—*Held*, by the Court of Appeal (reversing the decision of Kekewich, J.), that nothing to the N.E. of the limit of deviation could be considered to be "delineated" on the plan, and that the company could not take compulsorily anything beyond that limit. When a company seek to obtain power to acquire a limited portion only of a piece of land of great extent which is not broken up into closes, they must frame their deposited plans in such a way as to shew how much of it they mean to acquire power to take.—*Dowling v. Pontypool, Caerleon, and Newport Railway Company* (Law Rep. 18 Eq. 714) discussed. PROTHEROE *v.* TOTTENHAM AND FOREST GATE RAILWAY COMPANY - - - - C. A. 278

3. —— *Railway Company—Minerals required for support of Railway—Compensation Money—Settled Estate—Capital or Income—Apportionment—Tenant for Life—Remainderman—Lands Clauses Consolidation Act*, 1845, *s.* 69.] No apportionment can be directed under sect. 69 of the Lands Clauses Consolidation Act, 1845, and a tenant for life, without impeachment of waste, is not entitled to any part of the compensation money paid by a railway company under this Act in respect of minerals under the settled estate, though the whole of such minerals could probably have been worked out during his lifetime, and though a portion of them would, as a fact, have been worked out during the five years which elapsed between the notice of intention to work, and the actual sale to the railway company. *In re Barrington* (33 Ch. D. 523) discussed and distinguished. *In re* ROBINSON'S SETTLEMENT TRUSTS [129

LEASE—Building estate—Loan by mortgagor—Easement - - - 522
See BUILDING LEASE.

LEGACY—Abatement—Legacy to wife - 44
See ADMINISTRATION. 1.

—— Action to recover—Statute of Limitations
See LIMITATIONS, STATUTE OF. 1. [119

LICENSE—To work mines—Exclusive or non-exclusive - - - - 504
See MINE.

LIEN—Contract to make article on premises of purchaser - - - - 540
See CONTRACT.

—— Solicitor - - - - - 145
See SOLICITOR. 2.

LIGHT—Obstruction—Lease of part of land—Sale of the rest—Building estate 522
See BUILDING LEASE.

LIMITATIONS, STATUTE OF—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Express Trust—Implied Trust.*] A suit to recover a legacy from an executor is within the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, unless the legacy is vested in him on express trusts. A mere constructive trust will not prevent the statute from being a bar. A testatrix bequeathed a share of her residuary estate to two of her grandchildren, and declared that their father should from time to time regulate and direct the mode in which, during their minority, the shares bequeathed to them should be invested, applied, or accumulated, and that neither he nor the executor should be answerable for any loss on the investments. Part of the residuary estate of the testatrix consisted of a share of income which was released from accumulation by the Thellusson Act. By an order in an old suit this share of income was ordered to be paid to the executor of the testatrix as her legal personal representative, and he received it down to his death in 1888, a period of more than thirty years. In 1891 the grandchildren sued his executor for an account of this income:—*Held* (varying an order of North, J.), that the account must be limited to sums received within twelve years before the commencement of the proceedings of 1891, for that neither under the will of the testatrix nor under the order did the executor hold the moneys upon an express trust. *In re* JANE DAVIS. *In re* T. H. DAVIS. EVANS *v.* MOORE - - - - - C. A. 119

LIMITATIONS, STATUTE OF—*continued.*

2. —— *Trustee—Breach of Trust—Residuary Personalty held on Trust—Executor—Legacy—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.] A farmer, who died in 1872, by his will gave his residuary personalty to G., W., and T., upon trust, as soon as convenient after his decease, for conversion, and, after payment of his debts and funeral and testamentary expenses, to stand possessed thereof upon the trusts thereinafter declared as to the proceeds of sale of his realty. The realty was devised to G., W., and T., upon trust for sale, when X., the testator's youngest son, should attain twenty-one, and to hold the proceeds of sale and of conversion of the residuary personalty, after payment of certain expenses and incumbrances, upon trust to invest the proceeds of the residuary personalty, and pay the income, with the rents of the realty until sale, to P., the testator's widow, during widowhood (she maintaining and educating his family), and after her decease or second marriage, upon the trusts thereinafter declared. The trustees, as soon as X. attained twenty-one, were to invest £1400; pay the income to P., during widowhood; on her death, or second marriage, divide the £1400 among testator's four daughters; and stand possessed of the residue of the proceeds of sale of the realty and personalty, in trust, as soon as convenient after X. should have attained twenty-one, to pay the same to X. and his three elder brothers in the will named. G., W., and T., were also appointed executors of, and proved the will. Instead of realizing the residuary personalty, G., W., and T., in breach of trust, allowed P. and the children to reside at the farm carried on by the testator, and themselves carried on the farm, and maintained P. and the children, and educated the children, out of the profits of the farm, till 1882, when X. attained twenty-one, and the residuary personalty and the realty were sold. In 1890, P. and the children being all alive, and P. being still a widow, two of the sons commenced an action against T. (the surviving executor and trustee), for a declaration that he, as surviving trustee, was liable to make good an alleged loss of £1800, said to have resulted from the breaches of trust, and for payment into Court of the Plaintiffs' share of this sum, or, in the alternative, for a declaration that T., as surviving trustee, was liable to make good to the testator's estate the loss caused by such delay in realizing and by carrying on the farm, and an inquiry as to the amount of the loss:—*Held*, that the action was not one for a legacy to which the lapse of twelve years could be pleaded under 37 & 38 Vict. c. 57, s. 8; but an action for a breach of trust, to which "no existing Statute of Limitations" applied before the Trustee Act, 1888, was passed, and that, under s. 8 of that Act, the lapse of six years was a good plea as a bar to the action. *In re* Swain. Swain *v.* Bringeman **233**

—— Debt barred by—Debt owing by legatees *See* Administration. 2. [212

LOCAL GOVERNMENT ACTS—*Drainage—Judgment against Rural Sanitary Authority—Writ of Elegit—Lands acquired for Purposes of Sewage Disposal—Trust for Contributory Place—"General Expenses"—"Special Expenses"—Stay of Proceedings—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 175, 176, 229-235, 242, 270-275—*Public Works Loans Act*, 1875 (38 & 39 *Vict. c.* 89), *ss.* 28, 36—*Public Works Loans Act*, 1878 (41 & 42 *Vict. c.* 18), *s.* 4.] The Plaintiff brought an action against the Defendants, who were a rural sanitary authority, to restrain them from fouling a stream, and in 1885 recovered judgment against them with costs. The costs were not taxed until 1890. In 1891, the costs not having been paid, the Plaintiff sued out a writ of elegit under which an inquisition was taken, and the sheriff delivered in execution to the Plaintiff certain lands which had been acquired by the Defendants for the purpose of sewage works for the parish of N., a contributory place within their district, by means of money borrowed on the security of the separate rates of that parish. Upon motion by the Defendants to set aside the writ and inquisition:—*Held*, that the lands in question were held by the Defendants on trust for the parish of N., and could only be taken in execution for judgment debts exclusively chargeable against that place; that the costs of the action were "general expenses" not chargeable against that place or the separate rates levied within it, but against the common fund of the district; and that the judgment could only be enforced against property which had been acquired by means of that common fund:—*Held*, also, that the writ and inquisition being quite regular, the motion to set them aside was wrong in form; but that under the circumstances the Court would in the exercise of its discretion under sect. 24 (5) of the Judicature Act, 1873, order all further proceedings under the writ and inquisition to be stayed. Earl Jersey *v.* Uxbridge Rural Sanitary Authority [183

2. —— *Drainage—Local Authority—Allowing Sewage to cause Nuisance in adjoining District—Injunction—Stopping existing Drains—Compelling Legal Proceedings—Compelling performance of Public Duties—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 85, 86, 250—*Nuisances Removal Act*, 1855 (18 & 19 *Vict. c.* 121), *ss.* 8, 11, 12.] A detached portion of the parish of C. had no separate main drainage system, but certain houses therein were drained by means of pipes carrying the sewage into cesspools, the overflow pipes from which communicated with main pipes within such detached portion. The drainage of the houses, including such communications, was constructed with the sanction of the C. Vestry, as the local authority under the Metropolis Local Management Act, 1855. The main pipes communicated with watercourses within the adjoining district of the F. Local Board, and the sewage from the cesspools passed through the main pipes into the watercourses, and caused a nuisance in such adjoining district. The F. Local Board brought an information and action (to which the owners and occupiers of the houses were not parties) against the C. Vestry, for an injunction to restrain them from permitting, authorizing, or directing any sewage to pass from the detached portion of C. into the watercourses so as to cause a nuisance:—*Held*, (*a*) fol-

LOCAL GOVERNMENT ACTS—*continued.*
lowing the opinions expressed in *Attorney-General* v. *Guardians of Poor of Union of Dorking* (20 Ch. D. 595, 606), *Attorney-General* v. *Acton Local Board* (22 Ch. D. 221, 232), and *Charles* v. *Finchley Local Board* (23 Ch. D. 767, 777), that the C. Vestry could not stop up the communications which they had sanctioned:—*Held*, (*b*) that, inasmuch as the cesspools and drains were acting properly *quâ* cesspools and drains, no proceedings could be successfully taken by the C. Vestry against the owners or occupiers of the houses under sect. 85 of the Metropolis Local Management Act, 1855; and that, as the cause and effect of the nuisance were not both within the area of the jurisdiction of the C. Vestry, it was doubtful whether proceedings could be taken by them against the owners or occupiers of the houses under the Nuisances Removal Act, 1855:—*Held*, (*c*) that, assuming the C. Vestry could take proceedings under the Metropolis Local Management Act, 1855, or the Nuisances Removal Act, 1855, *Attorney-General* v. *Guardians of Poor of Union of Dorking* (20 Ch. D. 595, 606), was an authority that the vestry could not be compelled by injunction to take such proceedings:—*Held*, (*d*) on the authority of *Glossop* v. *Heston and Isleworth Local Board* (12 Ch. D. 102), that it was not ground for an injunction that the C. Vestry were not exercising or performing their other statutory powers and duties:—*Held*, therefore (on the C. Vestry undertaking not to sanction communications in future between houses within the detached portion of their parish and the main-pipes therein, until further order or without the consent of the F. Local Board), that the claim for an injunction failed. ATTORNEY-GENERAL *v.* CLERKENWELL VESTRY - 527

3. —— *Street Improvement — Expenses of Paving—"Owner"—Charge on Premises—Sale of Premises free from restrictive Covenant—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.] The word "owner" in the sects. 150 and 257 of the Public Health Act, 1875, does not include a person who has the benefit of a covenant restricting the use of the premises in respect of which expenses for street improvement have been incurred. Therefore, where a local authority had obtained a charge under sect. 257 on a piece of land, which was subject to a covenant restricting the owner thereof from building on it, it was *held*, reversing the decision of Stirling, J., that they were not entitled to an order for sale of the land free from such restrictive covenant. *Corporation of Birmingham* v. *Baker* (17 Ch. D. 782) distinguished. GUARDIANS OF TENDRING UNION *v.* DOWTON - - - - C. A. 265

LUNATIC—*Petition for Inquiry—Pending Proceedings—Application for Examination of alleged Lunatic—Opposition by alleged Lunatic.*] An order upon an alleged lunatic to submit to an examination ought not to be made against his will without great caution nor without real necessity; and whilst there is jurisdiction for the Master, and, if necessary, for the Court, to make such an order, no such order ought to be made by the Court adversely to a person, pending an inquiry into his state of mind, unless the Master or other person conducting the inquiry informs

LUNATIC—*continued.*
the Court that its order is necessary to enable him to come to a decision upon the subject.—Whether a Master can enforce such an order when made by him in a case where there is no jury, *quære*. *In re* B—— (AN ALLEGED LUNATIC) [C. A. 274

MEMORANDUM OF ASSOCIATION—Alteration of - - - - - 538
See COMPANY. 1.

MINE — *Deed — Construction — Conveyance—Exception of Minerals—License to work Minerals—Exclusive or non-exclusive—Setting aside Lease—Mutual Mistake.*] *Lord Mountjoy's Case* (Godb. 17; 1 Anderson, 307) does not decide that a license to dig coal cannot be exclusive, and although there is a primâ facie presumption against such a license being exclusive, the intention to exclude the grantor need not appear by express words. Dictum of Lord Ellenborough in *Chetham* v. *Williamson* (4 East, 469) dissented from. Earl G. and Viscount T., the Plaintiff's predecessors in title, having a general power of appointment over lands of which they were respectively tenant for life in possession and tenant for life in remainder, by a deed of exchange executed in 1783, granted and appointed such lands to the Defendant's predecessor in title in fee, saving and reserving to themselves and their heirs full and free liberty to get and carry away the coal within the said lands. The Plaintiff had only recently become aware of his rights under this deed, and neither he nor his predecessors in title had ever worked the coal therein referred to, and in 1877 the Plaintiff accepted a lease from the Defendant of a portion of such coal. The Plaintiff claimed the exclusive right to the coal, and he also claimed to have the lease set aside:—*Held*, that the saving clause operated not as an exception, but as a regrant of a license, and that the deed did not contain a sufficient indication of an intention to exclude the grantor:—*Held*, further, that the action being based on the exclusive right of the Plaintiff, he was not entitled in that action to have the lease set aside. DUKE OF SUTHERLAND *v.* HEATHCOTE [504

—— Compensation for—Railway company—Apportionment - - - 129
See LANDS CLAUSES ACT. 3.

MISTAKE—Mutual—Setting aside lease 504
See MINE.

MORTGAGE — *Payment off — Notice — Interest — Mortgage of Reversion.*] A mortgage was made of the mortgagor's interest in a fund in Court subject to a prior life interest. The fund was assigned by the mortgage deed to the mortgagee "to have, receive, and take the same," subject to the life interest and to the proviso for redemption. After the time appointed for redemption had expired the tenant for life died, and the trustee of a settlement of the fund made by the mortgagor presented a petition for the application of the fund in payment of the mortgage, and payment of the residue to the persons entitled thereto. The mortgagee had not demanded payment of the debt, or taken any steps to compel

MORTGAGE—*continued.*
payment:—*Held*, that, notwithstanding the nature of the mortgaged property and the form of the mortgage deed, the mortgagee was entitled to six months' interest from the date of the service of the petition on him. *Letts* v. *Hutchins* (Law Rep. 13 Eq. 176) explained. SMITH *v.* SMITH - - - - - - - 550
—— Equity of redemption—Reservation of new estate - - - - 474
See POWER.
—— Lease by mortgagor—Conveyancing Act, 1881 - - - - 522
See BUILDING LEASE.
—— Notice to trustee—Liability of trustee 82
See TRUSTEE. 2.
—— Title deeds—Lien of solicitor of mortgagee
See SOLICITOR. 2. [145

MORTMAIN—Power of trade union to acquire land - - - - - 159
See TRADE UNION.

NAME OF COMPANY—Alteration of - 538
See COMPANY. 1.

NEGOTIATION—Fee for—Solicitors Remuneration Act - - - - 8
See SOLICITOR. 1.

NOTICE—Mortgage—Priority—Liability of trustee - - - - - - 82
See TRUSTEE. 2.

NUISANCE—Drainage—Compelling legal proceedings - - - - 527
See LOCAL GOVERNMENT ACTS. 2.

PARTICULARS OF OBJECTIONS — Copyright action - - - - 418
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PAVING EXPENSES - - - 265
See LOCAL GOVERNMENT ACTS. 3.

PERPETUITY—Will—Charitable gift—Transfer to another charity - - - 252
See CHARITY. 2.
—— Will—Class - - - 197, 242
See WILL. 5, 8.

PICTURE—Copyright - - - 291
See COPYRIGHT. 2.

PLEDGE—Delivery order—Bills of Sale Act 206
See BILL OF SALE.

PORTION—Eldest son, not becoming entitled under the settlement—Resettlement
See SETTLEMENT. 2. [394

POSSESSION—Delivery order—Bills of Sale Act
See BILLS OF SALE. [206

POWER—*General Power—Words of Exception—Death of excepted Object—General Devise—Execution of Power—Wills Act* (1 *Vict. c.* 26), *s.* 27—*Mortgage by Donee of Power—Equity of Redemption—Reservation of New Estate—Alteration of Original Limitations.*] By a settlement of 1862 real estate, then subject to a mortgage in fee, was conveyed by B. to trustees, upon trust to permit her daughter R. (a married woman) to receive the rents for her separate use, and upon further trust "for such person or persons (not being her present husband, or any friend or relative of his), and for such estate or estates" as R. should by deed or will appoint; and, in default of appointment, then over. In 1868 B. and R., by a deed containing no recitals, mortgaged the property in fee (subject to the prior mortgage), the proviso for redemption reserving the right of reconveyance to R., "her heirs or assigns, or as she or they shall direct." In 1885 R., her husband being dead, made a will consisting of a general devise of all her real and personal estate in favour of a sister and her children:—*Held*, that the power of appointment given to R. by the settlement of 1862 was not a power "to appoint in any manner she might think proper," within sect. 27 of the Wills Act (1 Vict. c. 26), and, therefore, was not exercised by her general devise:—*Held*, also, that the limitations in the settlement were not altered by the form of the proviso for redemption in the mortgage of 1868 so as to confer upon R. an absolute estate in fee simple.—*Semble*, a power of appointment by deed or will in favour of any person or persons "except A.," may become a general power through A. being dead at the time the power is exercised, and thus be exerciseable by a general devise under sect. 27 of the Wills Act. *In re* BYRON'S SETTLEMENT. WILLIAMS *v.* MITCHELL - - - - - 474

PRACTICE—*Costs—"Full Costs"—Copyright—5 & 6 Vict. c.* 45, *s.* 26—*5 & 6 Vict. c.* 97, *s.* 2.] Where an action for alleged infringement of copyright is dismissed with "full costs," according to 5 & 6 Vict. c. 45, s. 26, the costs are to be taxed in the ordinary way as between party and party. The Act 5 & 6 Vict. c. 97, s. 2, which enacts that where by any public Act it is provided that "either double or treble costs or any other than the usual costs between party and party" shall or may be recovered, the party theretofore entitled to such double, treble or other costs shall instead thereof receive such full and reasonable indemnity as to costs as shall be taxed by the proper officer, does not apply, inasmuch as "full costs" are not costs other than the usual costs as between party and party. Decision of North, J., affirmed. AVERY *v.* WOOD - - - C. A. 115

2. —— *Receiver—Right of Way—Obstruction—Abatement—Inhabited House—Leave to Abate notwithstanding Receiver.*] It is not the course of the Court to refuse liberty to try a right claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim. In this action, which was for foreclosure, a receiver was appointed. In an earlier action, a building society had established against the Defendants in this action a right of way over part of the property now in the receiver's hands, but so much of their claim as asked for the removal of a house which obstructed the way was dismissed without costs, and no damages were given. The society now applied for leave, notwithstanding the receivership, to proceed under their common law rights to abate the obstruction:—*Held*, that though the society had failed to obtain a mandatory injunction, it did not follow that they had lost their right to abatement, or that other means were not still open to them of asserting their rights of way; that according to the authority of *Davies* v. *Williams* (16 Q. B. 546) the Applicants

PRACTICE—*continued.*
might, after notice and request to remove the obstructing house, pull it down although it was actually inhabited, and that under these circumstances leave ought to be given to the Applicants, notwithstanding the receiver, to pursue any remedies or do any acts they might lawfully take or do to abate the obstruction. *Baten's Case* (9 Rep. 53 b.) discussed. LANE *v.* CAPSEY [411

3. —— *Service out of the Jurisdiction—Trade-Mark—Rectification of Register—Notice of Motion—Registered Proprietor out of the Jurisdiction—Rules of Supreme Court*, 1883, *Order v., r. 9; Order xi., r. 1; Order lxvii., r. 5—Patents, Designs, and Trade Marks Act*, 1883, *s.* 90.] A notice of motion to rectify the register by striking out a trade-mark registered in the name of a foreign company not carrying on business within the jurisdiction was served on the Comptroller and the company. Service on the company held bad and set aside.—*Semble*, the proper course was to proceed on the notice against the Comptroller, after sending a copy to the company with an intimation that proceedings which might affect its interests were pending. *In re* LA COMPAGNIE GÉNÉRALE D'EAUX MINÉRALES ET DE BAINS DE MER - - - - - - - 451

4. —— *Substituted Service—Motion to Commit—Irregularity — Service on Solicitor — Personal Service—Motion to Attach—Appearance of Defendant—Waiver of Objection to Motion.*] Notice of motion to commit a Defendant must be served upon him personally, if practicable, service upon his solicitor being insufficient; and the Court will not make an order for substituted service until it is satisfied that every endeavour has been made to effect personal service. Mere knowledge on the part of the Defendant of the Plaintiff's intention to move to commit does not dispense with the necessity of endeavouring to effect personal service; and the appearance or the Defendant upon the motion is not a waiver of any objection on his part on the ground either of want of personal service or of any irregularity. MANDER *v.* FALCKE [488

5. —— *Serjeant-at-Arms—Tipstaff—Ward of Court—Custody—Enforcement of Order—Proper Officer—Form of Order.*] Notwithstanding the changes made by the Judicature Acts, there still is such an officer as the "Serjeant-at-Arms attending the Court," and he is the proper officer to execute and enforce all orders for the production or custody of a ward of Court. G—— *v.* L—— - - - - - - - 126

—— Copyright — Particulars of objection — Amendment - - - 418
See COPYRIGHT. 1.

PREFERENCE SHARES—Issue of new shares
See COMPANY. 4. [459

PROPERTY—Incomplete article contracted to be made - - - - 540
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PURCHASE—Annuity—Value in cash - 499
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RAILWAY COMPANY—Compensation for copyholds - - - - 443
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—— Deposited plans - - - 278
See LANDS CLAUSES ACT. 2.

REAL ESTATE—Devise of "effects" - 389
See WILL. 7.

—— English and Scotch—Scotch testator 568
See ADMINISTRATION. 3.

RECEIVER—Action against—Leave of Court
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REDEMPTION—Mortgage—Notice to pay—Interest - - - - 550
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—— Mortgage—Return of title deeds—Solicitor's lien - - - - 145
See SOLICITOR. 2.

REGISTRATION—Trade mark - 39, 139
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—— Trade mark—Rectification—Service out of jurisdiction - - - 451
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RELEASE OF DEBT — Appointment of debtor executor to creditor - - 422
See WILL. 1.

REMOTENESS—Will—Charitable gift—Transfer to another charity - - - 252
See CHARITY. 2.

—— Will—Class - - - 197, 242
See WILL. 5, 8.

REPAIR OF BUILDINGS—Accumulation of income - - - - 467
See ACCUMULATIONS.

RESTRAINT ON ANTICIPATION — Power of Court to remove - - - 547
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RETAINER—Trustee—Sums paid to infant—Infant's settlement - - - 553
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RULES OF SUPREME COURT, Order V., r. 9
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—— **Order XI., r. 1** - - - 451
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—— **Order LXVII., r. 5** - - - 451
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SALE—Settled Land Act—Costs of unsuccessful sale - - - - - 65
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SCHEME—Charity—Withdrawal of - 400
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SERVICE — Out of the jurisdiction — Foreign company - - - - 451
See PRACTICE. 3.

—— Substituted—Motion to commit - 488
See PRACTICE. 4.

SETTLED LAND ACT (45 & 46 *Vict. c.* 38), *ss.* 4, 21, *clause x.*, 46, *sub-s.* 6, 47, 55, *sub-s.* 3—*Costs of Attempted Sale—Payment out of Capital Money—Charge on Settled Land.*] Where a tenant for life, acting honestly and with due diligence in the exercise of the powers conferred on him by

SETTLED LAND ACT—*continued.*
the Settled Land Act, 1882, attempts to sell the settled land, but the sale is unsuccessful, the costs or expenses properly incurred by him in respect of such attempted sale are payable out of capital money under sect. 21, clause x., of the Act. —*In re Llewellin* (37 Ch. D. 317) followed.—Upon an application by the tenant for life in such a case in reference to costs or expenses so incurred, the Court, under sects. 46, sub-sect. 6, 47 and 55, sub-sect. 3, of the Act, has power to order that such costs or expenses be paid out of the property subject to the settlement, and raised by a charge on the settled land. *In re* SMITH'S SETTLED ESTATES - - - - - - 65

SETTLEMENT—*Agreement to settle after-acquired Property—Life Interest subject to Forfeiture on Alienation.*] By an agreement in contemplation of marriage the intended husband agreed that he would settle (inter alia) the sum of £5000, and any further moneys and property which he should receive and be entitled to under the will of his mother. Under the trusts of the settlement the intended wife was to have the first life interest in the settled funds. The mother afterwards by her will, in exercise of a power of appointment contained in the will of her father, gave to the husband a life interest subject to forfeiture upon alienation or attempted alienation by him:—*Held*, that the husband was entitled to this life interest under the will of his mother; that it was not comprised in the agreement for a settlement; and that there had been no forfeiture. *In re* CRAWSHAY. WALKER *v.* CRAWSHAY - 176

2. —— *Portions—"Eldest Son"—Resettlement—Mortgage by Tenant for Life and Eldest Son—Anticipation of Interest—Double Portion.*] By indenture of settlement, estates were limited to a father for life, with remainder to trustees for a term of years, with remainder to the father's first and other sons in tail male: the term was to secure £20,000 for younger children "other than an eldest or only son for the time being entitled under" the settlement. There were five children, G., C., and E., sons, and two daughters. G., the eldest son, on attaining his majority, joined with his father in barring the entail and resettling the estates to such uses as the father and son should jointly appoint, and subject thereto to the uses declared by the original settlement. Mortgages were created under the joint power to the amount of £8000, of which G. received £3000. G. predeceased the tenant for life without leaving male issue, and C. succeeded to the estates. The legal personal representatives of G. now claimed to be entitled to a further share in the portions fund:—*Held*, that G. must be taken to have anticipated the whole of what otherwise might have come to him under the settlement, and that his legal personal representatives were not entitled to any further share in the portions fund; and that as there was only one person to be excluded as "the eldest son," C., though he had succeeded to the bulk of the estates, nevertheless took a share in the portions fund.—Whether G.'s legal personal representatives would have been excluded from a share in the portions fund, if the joint power had never been exercised, or had only been exercised for an amount less than the value of a

SETTLEMENT—*continued.*
younger child's share, Query? *In re* FITZGERALD'S SETTLED ESTATES. SAUNDERS *v.* BOYD - - - - - - - 394

—— General power with an exception—Execution by will—Mortgage—Reservation of new estate - - - - 474
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—— Infant—Covenant to settle after-acquired property - - - - 48
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—— Infant—Repudiation - - - 553
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—— Ward of Court, after attaining twenty-one - - - - - 270
See INFANT. 3.

SEVERANCE—Joint tenancy - - 59
See JOINT TENANT.

SHARES—Bequest of—Debenture stock - 135
See WILL. 9.

—— Surrender of—Purchase by company - 459
See COMPANY. 4.

SHERIFF—Wrongful seizure—Priority - 260
See COMPANY. 6.

SOLICITOR—*Bill of Costs—Scale Fee—Negotiation Fee—Commission—General Order under Solicitors Remuneration Act*, 1881, *Sched. I., Part I., r.* 11.] S. employed H. as general agent with a view to developing an estate as a building property, on the terms of his having a commission of 2½ per cent. on the purchase-money of all lands sold during his agency, and on the capitalized value of the rents of all leases granted during the same period. An offer was made for purchase at a time when H. was too ill to attend at his office, and the negotiation was conducted by W., the solicitor of S., but H. was consulted repeatedly and gave advice as to the sale which was ultimately completed. On completion H. was paid 2½ per cent. on the purchase-money. W., in his bill of costs, claimed the scale fee for negotiating the sale, which claim was resisted on the ground that the vendor had paid a commission to an estate agent. The Taxing Master allowed the scale fee, being of opinion that as the commission paid to H. was not a payment in respect of this particular transaction but for general services, and would have been paid all the same if he had not intervened at all in the sale, it was not a commission within the meaning of the Solicitors Remuneration Order, Sched. I., Part I., r. 11:—*Held*, by North, J., that if H. had not been called in at all in this transaction, the payment of the commission, which would in that case have been a payment entirely in respect of other work, would not have been a payment of commission within the rule, but that as H. had assisted in the negotiation, he was paid for his assistance by the commission, although the commission also covered other work; that a commission, therefore, had been paid within the meaning of the rule, and that the scale fee for negotiation ought not to be allowed:—*Held*, by the Court of Appeal, that North, J., had put a correct construction on the rule. *In re* WITHALL - - C. A. 8

SOLICITOR—*continued.*

2. —— *Lien—Title Deeds held for Mortgagee—Costs of Mortgagee's Solicitor—Payment off of Mortgage—Right of Mortgagor to Return of Deeds.*] When a mortgagee has been paid by the mortgagor his principal, interest, and costs, and has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the mortgagee's solicitor for work done relating to the mortgaged property during the continuance of the mortgage. The equitable right of the mortgagor to have back from the mortgagee his deeds on payment of principal, interest, and costs, prevails against the solicitor's lien claimed in right of the mortgagee.—*Ogle* v. *Story* (4 B. & Ad. 735) discussed and distinguished. *In re* Llewellin, a Solicitor - - - 145

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21 Jac. 1, c. 16, s. 7—*Limitations* - 306
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29 Car. 2, c. 3, s. 4—*Statute of Frauds* - 77
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18 & 19 Vict. c. 120, ss. 68, 69, 85, 86, 250—*Metropolis, Management of* - 527
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23 & 24 Vict. c. 136, ss. 2, 4, 6, 8—*Charitable Trusts* - - - - 400
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25 & 26 Vict. c. 68, ss. 3, 4, 6—*Copyright* 291
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25 & 26 Vict. c. 89, ss. 75, 101, 102, 120—*Companies* - - - - 15
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34 & 35 Vict. c. 31, s. 7—*Trade Union* - 159
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37 & 38 Vict. c. 57, s. 8—*Real Property Limitations* - - - - 119, 233
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37 & 38 Vict. c. 62, s. 2—*Infants* - 553
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38 & 39 Vict. c. 55, ss. 150, 257—*Public Health*
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38 & 39 Vict. c. 89, ss. 28, 36—*Public Works Loans* - - - - 183
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40 & 41 Vict. c. 33—*Contingent Remainder*
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41 & 42 Vict. c. 18, s. 4—*Public Works Loans*
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44 & 45 Vict. c. 41, s. 18—*Conveyancing and Law of Property* - - - 522
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44 & 45 Vict. c. 44, Sched. I., Part I., r. 11—*Solicitors* - - - - 8
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45 & 46 Vict. c. 38, ss. 4, 21, 46, 47, 55 65
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45 & 46 Vict. c. 43, s. 8—*Bills of Sale* - 206
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46 & 47 Vict. c. 57, s. 90—*Patents, Designs and Trade Marks* - - - 451
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51 & 52 Vict. c. 59, s. 8—*Trustee Act* - 233
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52 & 53 Vict. c. 32, ss. 3, 6—*Trust Investments* - - - - 494
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53 & 54 Vict. c. 62, s. 1—*Companies, Memorandum of Association* - - 538
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TENANT FOR LIFE—*Timber—Waste—Will—Settled Estate—Equitable Estate—Crops—Periodical Cuttings—Proceeds of Sale—"Profits of Estate"—Capital or Income—"Timber Estate"—"Seasonable Wood"—"Silva Cædua"—"Coppice"—Custom—Local Usage—Evidence—Repair, Direction to keep in—Ornamental Lake, Fouling of—Negligence—Action by next Tenant for Life and Remainderman—Liability of Estate of late Tenant for Life—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 7.] A testator devised his freehold estate of W., in Buckinghamshire, to trustees for 100 years, if his widow and two other persons, or any of them, should so long live, "upon trust," out of the rents and profits, to pay a jointure to his widow, the interest on mortgages on the estate, and certain annuities; and to pay the surplus rents and profits to his widow during her life for her separate use without power of anticipation, and permit her to reside in and have the use of the mansion-house and grounds; and, subject to the term, he

TENANT FOR LIFE—*continued.*
devised the estate "to the use of" certain persons successively for life with successive remainders to their issue in strict settlement, with a proviso that the several limitations thereinbefore contained "to the use of any person or persons for life" should be "without impeachment of waste." And the testator declared that his widow, and every other person who, during the said term, should become for the time being entitled to the actual possession or to the surplus rents and profits of the estate, should keep the mansion-house, grounds, fences, gates, and appurtenances in good repair; and that it should be lawful for her or them, with the consent of the trustees, to fell timber (not being ornamental timber) necessary for such repair.—On the testator's death, his widow, as equitable tenant for life, entered into possession of the estate, and continued in possession until her death, she surviving the two other cestuis que vie named in the will. Upon the estate were extensive woods, consisting principally of beech trees (which, according to the custom of Buckinghamshire, were "timber"), besides other timber, such as oak, ash, and elm; and during her lifetime she cut and sold large quantities of the timber, received the proceeds, and applied them to her own use, her annual income from this source being considerable.—Immediately upon the widow's death, the next tenant for life and remainderman under the uses of the will brought an action against her executors seeking to make her estate liable, on the ground of "waste," for the timber so cut; and also for her neglect in having allowed an ornamental lake near the mansion-house to get into a foul condition. It was proved that the mode of cutting by the widow was in accordance with local usage and with the practice of the testator and his predecessors.—*Held*, by Chitty, J., (1) that the widow had not committed waste in cutting the timber, and (2) that she had incurred no obligation, either express or implied, under the will to cleanse the lake.—Upon appeal (before Lindley, Bowen, and Kay, L.JJ.)—the appeal relating to the first point only—the decision of Chitty, J., was affirmed, Kay, L.J., *dissentiente*:—*Per* Lindley and Bowen, L.JJ.: Evidence of modern usage as to a particular mode of cultivation of property is just as admissible in construing a devise as in construing a grant or lease.—*Per* Kay, L.J.: There is no exception from the common law as to waste in favour of the limited owner of a "timber estate." A custom sufficient to control the common law as to waste in cutting down timber must be nothing less than an immemorial custom for a limited owner to commit such waste; mere modern usage or practice to that effect is insufficient.—The doctrine of "waste," as applicable to the cutting of timber by a tenant for life of a freehold estate, discussed.—The meaning of "timber estate," "timber," "seasonable wood," "*silva cædua*," and "coppice," discussed.—The exception in *Honywood* v. *Honywood* (Law Rep. 18 Eq. 309, 310), in favour of owners of timber estates, considered. DASHWOOD *v.* MAGNIAC [C. A. 306

—— Devise to A. "for his life and life of his heir" *See* WILL. 2. [159

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—— Devise to issue of—Executory devise 150
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TENANT IN COMMON—Or joint tenant—Will *See* WILL. 4. [53

TIMBER—Periodical cuttings — Waste—Beech woods - - - - 306
See TENANT FOR LIFE.

TOMB—Repairs of—Charitable gift - 252
See CHARITY. 2.

TRADE-MARK—*Registration for entire Class—User for part of Class—Exclusive Title for entire Class—Trade Term—Infringement.*] In 1879 the Plaintiff registered as his trade-mark for the whole of Class 45: i.e., "tobacco whether manufactured or unmanufactured," a device consisting of (inter alia) a shield with three crowns, and the word "Mixture" underneath; since registration the Plaintiff used this trade-mark solely on packages containing cut tobacco; subsequently the Plaintiff used the shield and three crowns without the word "Mixture," a trade term not appropriate to cigars, or boxes of cigars. The Defendants, cigar manufacturers, labelled their boxes with a device consisting of a shield and three crowns. On an application for an injunction to restrain this infringement:—*Held*, that registration of a trade-mark for an entire class, followed by user on one description of goods only, did not give the exclusive right to the use of such trade-mark for all descriptions of goods in that class, and that under the circumstances the Plaintiff was not entitled to an injunction.—*Edwards* v. *Dennis* (30 Ch. D. 454) discussed and applied. HARGREAVE *v.* FREEMAN - - 39

2. —— *Registration—Practice—Alteration of Register by omitting words "trade mark"—Old Mark—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 92.] Labels registered in 1878 as old marks, contained, with other matter, the words "trade mark," so placed as to appear to have particular reference to the device on the labels, rather than to the labels as a whole. In consequence of the observations of Fry, L.J., in *In re Apollinaris Company's Trade-marks* ([1891] 2 Ch. 186, 233), the owner of these marks now applied for leave to alter the registration by striking out the words "trade mark:"—*Held*, that the marks, being old marks, ought to be registered just as they were used prior to August, 1875, and that to strike out the words "trade mark" would be a material alteration: that, inasmuch as there had been an indication of an intention in these marks, as registered, to claim only the device as the trade-mark, the public were entitled to have the same indication of a restricted claim and the consequent protection, retained on the register, and that on these grounds the application must be refused. *In re Colman's Trade-marks* ([1891] 2 Ch. 402) distinguished. *In re* PHILLIPS' TRADE-MARKS - - - 139

TRADE-MARK—*continued.*

—— Rectification of register—Service out of jurisdiction—Foreign company - 451
See PRACTICE. 3.

TRADE UNION—*Power to acquire and hold Land—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 7—*Validity.*] A trade union registered under the Trade Union Acts can, by virtue of the provisions of sect. 7 of the Trade Union Act, 1871, but not otherwise, acquire and hold land.—The word "purchase" in that section is used in its ordinary sense of "buy for money;" not in the technical legal sense of "acquire otherwise than by descent or escheat," and consequently a devise of land by will to such a society is invalid. *In re* AMOS. CARRIER *v.* PRICE - - - - 159

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TRUSTEE — *Investment — Annuity — Appropriation—Power to vary Investments—Trust Investment Act*, 1889 (52 & 53 *Vict. c.* 32), *ss.* 3, 6.] The power given to trustees by sect. 3 of the Trust Investment Act, 1889, to invest trust funds in any of the stocks therein mentioned, does not extend to authorizing them to set apart or appropriate any of such stocks to answer a particular purpose, as, for instance, to provide for an annuity given by will, so as to facilitate the distribution of the rest of the testator's estate.—*Quære*, whether such an object can be effected under the power of varying investments given at the end of sect. 3, that power being applicable to any investments, whether made under the Act or not: *In re Dick* ([1891] 1 Ch. 423). *In re* OWTHWAITE. OWTHWAITE *v.* TAYLOR - - - - 494

2. —— *Mortgage—Life Interest—Prior Incumbrances — Notice — Inquiry by Mortgagor—Fraud—Misrepresentation—Mistake—Liability of Trustee—Duty of Trustee—Contract—Warranty—Estoppel.*] Although it is the duty of a trustee to give his cestui que trust, on demand, information with respect to the dealings with and position of the trust fund, it is no part of his duty to assist his cestui que trust in selling or incumbering his beneficial interest by telling him what incumbrances he, the cestui que trust, has created, nor which of his incumbrancers have given notice of their respective charges; and it follows that the trustee is under no obligation to answer the inquiries of a stranger about to deal with the cestui que trust.—If the trustee takes upon himself to answer the inquiries of a stranger about to deal with the cestui que trust, he is not under any legal obligation to do more than to give honest answers to the best of his actual knowledge and belief: he is not bound to make inquiries himself. Provided he answers honestly, he incurs no liability to the inquirer, unless he binds himself by a statement amounting to a warranty, or so expresses himself as to be estopped from afterwards denying the truth of what he has said.—A statement to operate as an estoppel must be clear and unambiguous.—The doctrine of *Derry* v. *Peek* (14 App. Cas. 337)—that a person is not liable for a false representation upon the faith of which another person acts, even though carelessly made, provided he made it in the honest belief that it was true—does not apply where there is a legal obligation on the part of one person toward another to give him correct information; as, for instance, where the law of warranties or of estoppel is applicable.—Having regard to *Derry* v. *Peek*, *Burrowes* v. *Lock* (10 Ves. 470) can now only be supported on the ground of estoppel.—*Slim* v. *Croucher* (1 D. F. & J. 518) cannot be supported on the ground either of warranty or of estoppel, and is therefore inconsistent with and is overruled by *Derry* v. *Peek*.—*Per* Lindley, L.J.:—An incumbrancer of a trust fund who first gives notice to any of the trustees obtains priority over any prior incumbrancer who has given no notice to any of them; but notice to one does not affect the other trustees so as to make them liable for what they may do in ignorance of the notice of their co-trustee.—The doctrine of estoppel as applicable to innocent misrepresentations, discussed and explained.—B., being entitled under a settlement to a life interest in a trust fund, applied to the Plaintiff for a loan on the security of such life interest, at the same time referring the Plaintiff to the Defendant, one of the trustees of the settlement, for information as to his, B.'s, means and position. The Plaintiff thereupon wrote to the Defendant inquiring what the trust fund consisted of, and whether B.'s life interest was subject to any incumbrances, but not stating that B. had applied for an advance. The Defendant replied that the life interest was subject to certain incumbrances, mentioning them, but did not say there were no others. The Plaintiff then made an advance to B. on the security of a mortgage by B. of his life interest. Subsequently the Plaintiff discovered that the life interest was subject to several incumbrances prior to his own, besides those the Defendant had mentioned, but the existence of which, as was admitted by the Plaintiff, the Defendant had forgotten when replying to the Plaintiff's inquiries, though he had had notice of them. The Plaintiff's security being insufficient, he brought an action against the Defendant to have him declared liable for the amount due on the security, alleging that the advance to B. was made upon the faith of the Defendant's written representations:—*Held*, that the Defendant was not liable either on the ground of fraud, breach of duty, warranty, or estoppel.—Decision of North, J., reversed. LOW *v.* BOUVERIE [C. A. 82

—— Breach of trust—Statute of Limitations
See LIMITATIONS, STATUTE OF. 2. [233

—— Retainer — Compensation — Infant's settlement - - - - - 553
See INFANT. 2.

VENDOR AND PURCHASER — *Contract — Sale of Land—Description of Vendor—"Landlord"—Subsequent Letter referring to Contract and Vendor—Statute of Frauds*, *s.* 4.] The Defendant signed a document dated the 7th of October, 1889, whereby he agreed to purchase a freehold farm for £650, and stated that he had paid a certain sum by way of deposit to "Messrs. R. as agents for the vendor." The document continued: "I hereby agree to pay in the usual way

VENDOR AND PURCHASER—*continued.*
for the tenant-right (the landlord to be considered as an outgoing tenant according to the custom of the county)."—The vendor's name (Coombs) was not mentioned in the document, and he did not sign it, but it was signed by a clerk of Messrs. R.—In a subsequent letter to the vendor's solicitor the Defendant asked that the balance of the purchase-money might be allowed to remain on mortgage, and concluded: "Let me know by return of post, and then Mr. Coombs could sign off the deeds . . . . I should like a copy of our agreement":—*Held*, that by the word "landlord" the vendor was not sufficiently described in the document of the 7th of October, 1889, and that such document was not a sufficient agreement within the Statute of Frauds.—*Held*, also, that the subsequent letter did not so clearly refer to the previous document, and shew the name of the vendor, as to cure the defect in such document. COOMBS *v.* WILKES - - 77

2. —— *Right of Way—Latent Defect—Compensation—Rescission.*] By an agreement between a vendor and a purchaser, it was agreed that the vendor should sell and the purchaser buy the hereditaments described in the schedule and the inheritance thereof in fee simple in possession. Clause 6 was to the effect that the description of the property in the schedule was believed to be correct; but if any error should be found therein the same should not annul the sale, but compensation should be allowed in respect thereof; and clause 8 was to the effect that if the purchaser should insist on any objection or requisition in respect of the title which the vendor should be unable or unwilling to remove or comply with, the vendor should be at liberty to rescind the contract.—The schedule described the property as "all that messuage or dwelling-house called Thatched House, &c., with the stabling and outbuildings and garden thereto belonging, and also the piece of land adjoining, which said premises contain about 3½ acres, and are more particularly shewn in the plans hereto annexed."—Until after the contract had been entered into and the title investigated, neither the vendor nor purchaser was aware of a right of way which existed over a portion of the land contracted to be sold.—The purchaser insisting on his right to compensation under clause 6, the vendor gave notice of rescission under clause 8 of the agreement, and commenced this action to enforce the right, and to have it declared that the notice of rescission was good under clause 8:—*Held*, that the existence of the right of way was a "latent defect" in the title; and although the error was one falling within clause 6 of the contract, it was none the less an objection to title within clause 8, and that the vendor was entitled to rescind. ASHBURNER *v.* SEWELL **405**

VESTING—Gift to class—Period of ascertaining - - - - - **197**
See WILL. 5.

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WAIVER—Irregularity of service—Motion to commit - - - - **488**
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WARD OF COURT—Enforcement of order **126**
See PRACTICE. 5.

—— Settlement—Marriage after attaining twenty-one - - - - **270**
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WARRANTY—Statement by trustee—Estoppel - - - - - **82**
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WASTE—Periodical cutting of timber—Ornamental lake - - - - **306**
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WAY—Compensation for—Latent defect - **405**
See VENDOR AND PURCHASER. 2.

—— Obstruction—Receiver in possession—Leave to try right - - - - **411**
See PRACTICE. 2.

WILL—*Debt due from Legatee—Payments to Legatee by Testatrix—Appointment of Debtor as Executor—Release of Debt—Rebuttal of Claim in Equity by Presumption of Intention to forgive Debt—Admissibility of Evidence of Intention.*] Testatrix by her will, dated in 1886, amongst other legacies bequeathed to the Plaintiff, a clergyman whose church she attended, two legacies of £100 each. She gave her residuary estate to the Defendant, and appointed the Plaintiff and Defendant to be her executors. By a codicil, dated in 1887, she gave additional legacies, including one of £700, to the Plaintiff, and in other respects confirmed her will. She afterwards in her lifetime made payments in cash on account of the legacies to the Plaintiff, though at that time he was indebted to her in a greater amount. She died in 1888, and her will was proved by the Defendant alone, liberty being reserved to the Plaintiff to do so. The Defendant alleged that the Plaintiff was indebted to the testatrix's estate to an amount exceeding the value of his legacies, and on that ground refused to pay them. The Plaintiff admitted that the testatrix had during her life made various payments to him, and on his behalf; but alleged that such payments were intended by the testatrix to be gifts. The Court inferred from the evidence that the Defendant was a party to the making of the codicil in the form which it took, and was aware of the intention of the testatrix that the legacies should be paid to the Plaintiff:—*Held*, (1) that the appointment of the Plaintiff as executor released the debt at law although he had not proved the will; (2) on the evidence, that any claim in Equity was rebutted by the presumption of the intention of the testatrix to forgive the debt; (3) that evidence of the testatrix's intention to forgive the debt in her lifetime was admissible, and (4) even if that were not so, that under the circumstances the Defendant could not as against the Plaintiff set up the debts due from him to the testatrix.—*Wekett* v. *Raby* (2 Bro. P. C. 386) and *Strong* v. *Bird* (Law Rep. 18 Eq. 315) followed.—*Selwin* v. *Brown* (3 Bro. P. C. 607) distinguished. *In re* APPLEBEE. LEVESON *v.* BEALES - - - - - **422**

2. —— *Devise to A. "for his life and the life of his heir."*] A testator devised land to A. "for his life and the life of his heir":—*Held*, that the devise was legally valid, and that the effect was

WILL—*continued.*

to give to the devisee an estate during his own life and the life of the person who should be ascertained to be his heir at the time of his death. *In re* Amos. Carrier *v.* Price - 159

3. —— *Forfeiture Clause—Bankruptcy—Annulment—Time of Annulment.*] A testator by his will gave to his trustees real and personal estate in trust to pay the rents and profits to his children as tenants in common during their respective lives with benefit of survivorship. He then declared that if by any act or by operation of law any interests given by his will in trust for his children should be alienated, whereby the same should vest in any other person, then the trustees should apply the interest so aliened to and among the other persons entitled to the same by survivorship, as in the case of the death of the persons so aliening.—One of the testator's children became a bankrupt between the date of the will and the testator's death. Within a year after the testator's death she became entitled to property which when sold was sufficient to pay the debts and costs; but the bankruptcy was not annulled until more than two years after that. The trustees of the will had paid the rents and profits to the other children, considering that they were forfeited:—*Held* (affirming the decision of Kekewich, J.), that the life interest of the legatee in the rents and profits was forfeited by her bankruptcy.—*White* v. *Chitty* (Law Rep. 1 Eq. 372) and *Lloyd* v. *Lloyd* (Law Rep 2 Eq. 722) distinguished. Metcalfe *v.* Metcalfe C. A. 1

4. —— *Gift to Children and issue of deceased Children — "Share and Share alike" — Joint Tenancy or Tenancy in Common.*] A testator devised real estate to trustees in fee, upon certain trusts during the lives of his sons and daughters and the survivors and survivor of them. And from and after the death of the survivor of his sons and daughters, or during the lives or life of all or any with their concurrence, upon trust to sell the property, and to stand possessed of the proceeds "upon trust for all and every my said sons and daughters who shall be then living, and the issue of any then dead (such issue standing in loco parentis) share and share alike":—*Held*, that the sons and daughters and the issue of a deceased son or daughter (as representing their deceased parent) took as tenants in common, but that, there not being words of severance among the issue of a deceased son or daughter such issue took inter se as joint tenants.—*Shepherdson* v. *Dale* (12 Jur. (N.S.) 156) disapproved. *In re* Yates. Bostock *v.* D'Eyncourt - - 53

5. —— *Gift to a Class—Vested or Contingent Gift—Period of ascertainment of Class—Remoteness.*] A testator by will dated in 1848 gave his real and residuary personal estate upon trust for sale, conversion and investment, and after giving certain annuities directed his trustees to hold the investments and the income thereof "upon trust to pay and divide the same equally between the children of my son J. M., viz., R., E., M., A., J., and any other children who may hereafter be born, as and when they shall respectively attain the age of twenty-five years," and the testator gave his trustees power "in the meantime to pay and apply the whole or any part of the remainder of the

WILL—*continued.*

income of the investments for the maintenance and education of such grandchildren during their minority;" and also "to pay and apply for the benefit or advancement of his said grandchildren or any of them any part not exceeding one-half of the capital to which they or he may be entitled expectant on their, his, or her attaining the age of twenty-five years."—At the testator's death in 1879, his son J. M. had five children living; one child of J. M.'s was born four months after the testator's death, and two more were subsequently born; all of which children were still living. The eldest child of J. M. attained the age of twenty-five in January, 1890:—*Held*, (1) that the children of J. M. did not take vested interests; (2) that the gift was a gift to a class which must be ascertained when the first of the children of J. M. attained twenty-five, and (3) that the gift was void for remoteness. *In re* Mervin. Mervin *v.* Crossman - - 197

6. —— *Gift to such Children and Issue of Tenant for Life as either before or after Death of Tenant for Life should attain Twenty-one—Contingent Remainder—Executory Devise.*] A gift to A. for life, and from and after the decease of A. unto and to the use of such child or children of A. living at his decease, and such issue then living of the child or children of A. then deceased, as either before or after the death of A. should attain the age of twenty-one years, or die under that age and leave issue:—*Held*, that this limitation was an executory devise and not a contingent remainder.—*In re Lechmere and Lloyd* (18 Ch. D. 524) and *Miles* v. *Jarvis* (24 Ch. D. 633) followed. *Brackenbury* v. *Gibbons* (2 Ch. D. 417) not followed. — The legal operation and effect of clauses for maintenance and advancement where no legal estate is vested in the trustees discussed and stated. Dean *v.* Dean 150

7. —— *Real Estate—"Effects."*] A testator "gave, devised, and bequeathed" to his wife "all my furniture, goods, chattels, and effects that I may be possessed of at my decease, whatsoever the same may be or wheresoever the same may be situate." After the death of his wife he "gave, devised, and bequeathed," to be equally divided between three of his children until they should attain the age of twenty-one, "the furniture and moneys, or any property which my said wife may have become entitled to through this my will or through any other source"; and, after they had attained twenty-one, he directed that "the furniture, goods, chattels, and effects, whatsoever the same may be or wheresoever it may be situated, and any moneys my said wife may be entitled to at the time of my decease," should be equally divided amongst his six children. The testator's property substantially consisted of an undivided moiety in real estate, his personalty being of very trifling amount:—*Held*, that although the use of the word "devise," or of the expression "whatsoever the same may be," would not of itself have been enough to make the word "effects" include real estate, the combination of "devise" with the words "whatsoever the same may be and wheresoever the same may be situate," followed in a subsequent clause by the word "property," used as equivalent to

WILL—*continued.*
"effects," was enough to shew the intention to dispose of real estate, and that the undivided moiety passed by the will. HALL *v.* HALL 389

8. —— *Remoteness—Gift over on a Compound Event—Splitting Gift over.*] A testator gave one-fifth share of his residuary estate upon trust for his son A. for life, and after his death upon trust for such child or children of A. as being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, and also such child or children of any son or daughter of A. who might die under the age of twenty-one years as should live to attain twenty-one, or, being a daughter, to be married, in equal shares and proportions per stirpes. The four other fifth shares were given by reference on similar trusts for the testator's daughters B. C. D. and E. respectively, and their respective issue. And the testator declared that if any or either of A. B. C. D. and E. should die without leaving any lawful issue who should live to attain a vested interest in their respective shares of the estate, the share or shares to which such failure should happen should go over on the trusts therein mentioned. B. died without ever having had a child:—*Held* (affirming the decision of Kekewich, J.), that the gift over in the event of B.'s dying without leaving lawful issue who should live to attain a vested interest could not be split so as to make the gift over take effect in the event which had happened of her dying without ever having had a child.—*Evers* v. *Challis* (7 H. L. C. 531) considered; *Watson* v. *Young* (28 Ch. D. 436) observed upon. *In re* BENCE. SMITH *v.* BENCE [C. A. 242

9. —— "*Shares*"—*Debenture Stock.*] A bequest of all a testator's "shares" in a public company will not pass debenture stock.—Dictum of James, L.J., in *Attree* v. *Hawe* (9 Ch. D. 349), that debenture stock "is of the same nature as other stock of the company," and is "nothing but preference stock with a special preference," discussed and explained. *In re* BODMAN. BODMAN *v.* BODMAN - - - - 135

10. —— *Tenant for Life—Enjoyment of Income in Specie—Gift of Securities "for the time being constituting or representing Residuary Personal Estate"—Absolute discretionary Power to Trustees to retain Investments.*] A testator by his will gave his residuary estate to trustees upon trust for conversion, and investment of the proceeds in specified securities, with power to the trustees in their absolute discretion to retain any securities or property belonging to him at his death unconverted, for such period as they

WILL—*continued.*
should think fit, and declared that his trustees should stand possessed of "the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects thereinbefore bequeathed, and of the income thereof," upon trust to pay the income to certain persons for life with remainders over.—The estate of the testator comprised certain American bonds, which were not included among the securities authorized by the will as investments, but were retained by the trustees in exercise of the discretion given to them. These bonds, which bore interest at 6 per cent., were redeemable at par at a future date, and their present market value was considerably above par:—*Held*, that the tenants for life were entitled to the whole net income of the bonds so retained. *In re* THOMAS. WOOD *v.* THOMAS 482

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